[2019] IEHC 715

THE HIGH COURT

JUDICIAL REVIEW

[RECORD NO. 2018/374 JR]

BETWEEN

BRIAN O'BYRNE

APPLICANT

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

[RECORD NO. 2018/482 JR]

BETWEEN

ORLAGH NEVILLE

APPLICANT

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on 30th day of October, 2019

Nature of the case

1. This case concerns the interaction between the "fixed charge notice" regime, which facilitates early payment of a relatively small fine in respect of certain road traffic offences without the necessity of any court appearance, and the conduct of criminal trials in respect of the same road traffic offences in the District Court when the fixed charge has not been paid. The case raises issues concerning the impact and validity of s.44(10) of the Road Traffic Act 2010 as amended by the Road Traffic Act 2016 (brought into force on 1st June, 2017). An important feature of each of the applicant's cases is that a District Judge convicted each of them notwithstanding that neither received the first fixed charge notice under the regime.

The fixed charge penalty system described in simple terms

2. The fixed charge penalty system as currently set out in legislation can be briefly summarised as follows. (The detail of the legislative provisions is set out later in this judgment). I preface this by saying that I am stripping the system down to its bare bones and also focussing on the situation where service of the fixed charge notice is sought to be effected by post. The following does not claim to be in any way comprehensive but rather consists of an X-ray of the system in order to assist with the analysis in this case.

- A person is reasonably believed to have committed a particular road traffic offence which falls within this regime. The offences in question are fixed by Ministerial order, and include driving while holding a mobile phone.

- A fixed charge notice is posted to the motorist. This is the "initial" fixed charge notice under s.35, or what I will call the "s.35 notice". It tells the motorist that he or she can avoid going to court by paying a particular fine within 28 days, or an increased fine during days 28-56. The increase is 50% of the original figure e.g. from €60 to €90. The person will also get three penalty points.

- If the person does not pay anything in response to the s.35 notice, a further two documents are posted out to him after 56 days; (1) a summons requiring him to attend court to answer a complaint that he committed the offence in question, and (2) a second fixed charge notice which says that he can avoid going to court if he pays a fine at least 7 days before the court hearing, in which case the prosecution will be discontinued. This fine has again been increased and amounts to double the original fine e.g. €120. I will call this second fixed charge notice the "s.44 fixed charge notice". Again, if the person pays the fixed charge, the penalty points imposed consists of three points.

- If the person has not paid in response to the s.44 fixed charge notice within a prescribed time, the case will proceed to court. If the person is convicted by the court, he will receive a fine and a mandatory five penalty points. Counsel in the case before me indicated that this five-penalty-point imposition was mandatory and not discretionary.

The purpose of the fixed charge penalty scheme

3. Obviously, therefore, the purpose of the fixed charge scheme as a whole is to give the motorist a chance to avoid going to court with all the consequences which that entails, and provides to the State a quick, cheap and efficient way of imposing penalties on erring motorists without the expense and inconvenience of having to bring prosecutions in all such cases.

4. The relatively new "second chance" provisions in s.44 of the Act also fall in line with this purpose and give the motorist a final chance to avoid going to court. This came into force on 1st June, 2017.

5. The entire system as it currently stands could be described as a carrot-and-stick approach. There are several carrots and one stick. The stick is the prospect of criminal prosecution and conviction, accompanied by a fine and mandatory five penalty points. The carrots are the possibility of avoiding prosecution by paying a fine and incurring three penalty points. The first "s.35 notice" offers the motorist two carrots of diminishing size; then the s.44 notice offers the motorist one final carrot which is a smaller carrot than either of the carrots in the s.35 notice. The size of the carrot which is offered to the motorist diminishes as time goes on; the biggest carrot (smallest fine) is offered to those who pay early, the smallest carrot (biggest fine) is offered to those who pay late. All of this makes sense in the generality. The system is unlikely to cause unfairness if it operates as it is intended to operate, such that a person only gets the stick if he or she has declined to avail of the earlier carrots. However in real life, things do not always work out as planned, and this case throws up the potential wrinkles in the system when the first fixed charge notice is posted but fails to come through a person's letterbox.

6. In *Kinsella v. DPP* [2018] IEHC 474, the High Court (McDermott J.) described the purpose of the fixed penalty notice in more elegant terms than I have done above:

"17. The purpose of a fixed penalty notice is to provide an erring motorist with a quick and efficient method of acknowledging his wrongdoing and submitting to a lesser penalty than that which might be imposed after conviction. In doing so the motorist also avoids prosecution and the recording of a potential conviction for a criminal offence. The provisions of [the relevant legislation as it then stood] are intended to ensure that a person who is served with a fixed penalty notice is afforded the opportunity within the prescribed period to pay the penalty and in that period of grace, he may not be prosecuted for the offences. If the penalty is paid, he may not be prosecuted at all. If the penalty is unpaid a summons may issue based on an appropriate complaint. Once the summons had been duly served, the matter comes before the court which is vested with full jurisdiction to hear and determine the charges. The court's jurisdiction is based on the charges set out in the summons which issued on the basis of a complaint duly made."

A hypothetical example to highlight issues arising in the case

7. A hypothetical example may be helpful to illustrate the issue which arises in this case. Let us suppose a number of motorists are each reasonably suspected by the Gardaí of having committed a particular road traffic offence, such as speeding, or driving while holding a mobile phone. Let us assume further that each of them did in fact commit the offence in question. A fixed charge notice is posted to each of them. This fixed charge notice says that the motorist can pay €60 within 28 days, or €90 between 28-56 days; if the motorist does this, he or she will also receive three penalty points.

8. David, the first of these hypothetical motorists, receives his s.35 fixed charge notice. He pays the fine of €60 and receives his three penalty points. Matters are then at an end as far as David is concerned.

9. Brendan does not receive his s.35 fixed charge notice. Let us assume that he genuinely does not receive the letter for some particular reason, such as a postal strike or an error on the part of a new postman who delivered to a neighbour by mistake. Brendan, therefore, is not aware of the fact that he is suspected of an offence or that he could pay an early fine, because he did not receive the notice. After 56 days have passed, he receives two documents in the post: a summons to go to court and a fixed charge notice. This fixed charge notice tells him that he can avoid going to court by paying a €120 fine; he would also receive three penalty points. He is taken aback because there is a reference to an earlier fixed charge notice which he did not receive. He decides to go to court and explain to the judge that he did not receive the first fixed charge notice. Let us assume further that Brendan does this, and that the judge in his particular case is satisfied on the balance of probabilities (i.e. considers it likely) that Brendan as a matter of fact did not receive the initial notice. Nonetheless, the judge proceeds to convict Brendan and says he is obliged to do so because of s.44(10) of the legislation. He says that he must impose a mandatory five penalty points on Brendan as well as a fine. Brendan feels very hard done by because he (unlike David) never got the chance to deal with his offence by paying a €60 fine and three penalty points; and now he has a criminal conviction, a fine and five

penalty points. (The reader might note that Brendan's position is that of the applicants in the present case).

10. Fedelma lives beside Brendan and, because of the same postal problem that afflicted Brendan, did not receive the s.35 notice either. When she receives the s.44 notice and summons, she (like Brendan) is surprised to read about a first fixed charge notice because she did not receive it. However, when she looks at her options (paying a €120 fine with three penalty points, or going to court and facing a fine and five penalty points), she chooses the lesser of two evils and pays the €120 fine and incurs three penalty points. She grumbles about it however, feeling rather hard done by because she never had the option of paying the €60 fine like David, but she is relieved that he does not have a criminal conviction, a fine plus five penalty points, like Brendan.

11. Lucy receives all the documents sent to her: initially, the s.35 notice, and later, the s.44 notice together with the summons. For reasons best known to herself, she buries her head in the sand, ignores both fixed charge notices and fails to pay. She later finds herself in the District Court on foot of the summons. She is convicted and receives a fine and the mandatory five penalty points. She is precisely the kind of person the "stick" of prosecution is designed to target.

12. Finally, let me introduce Michelle. Michelle is someone who might colloquially be described as a "chancer". Michelle in fact received both fixed charge notices and failed to pay either of them, but goes to court and tells the District Court (dishonestly) that she did not receive the first fixed charge notice. The District Judge is unusually gullible and believes her.

The relevant legislative provisions

13. Until 1st June, 2017, the provisions concerning fixed charge notices were set out in ss.103-107 of the Road Traffic Act 1961, as amended by s.11 of the Road Traffic Act 2002. After the 1st June, 2017, the relevant provisions were set out in ss.34-47 of the Road Traffic Act 2010 as amended by the Road Traffic Act 2016 and commenced by SI No. 242 of 2017. The original scheme provided for the service of only one fixed charge notice. One of the changes which came in after 1st June, 2017 was the requirement of service of a second fixed charge notice (which I have called the "s.44 notice"), which was to be served at the same time as the summons, and gave the person one last chance to avoid going to court by paying an increased fine. Another change was the introduction of s.44(10) of the legislation, which provided that it would not be a defence to show that the first fixed charge notice had not been served. I intend to set out only the relevant portions of the legislative provisions (those which concern a person who is identified by the Garda).

14. Section 35 of the RTA 2010 (as amended) provides the following:

> 35.— (1) Where a member of the Garda Síochána has reasonable grounds for believing that a fixed charge offence is being or has been committed by a person—

(*a*) if the member identifies the person, the member shall *serve*, or cause to be served, *personally or by post*, on the person a fixed charge notice,

…

(2) A prosecution in respect of a fixed charge offence shall not be instituted unless a fixed charge notice in respect of the alleged offence has been served on the person concerned under this section and the person fails to pay the fixed charge in accordance with the notice.

(3) Where a fixed charge notice is being served on a person identified under subsection *(1) (a)* or on a registered owner where the person is not identified under subsection *(1) (b)* ,it may be served—

(a) in the case of personal service—

(i) where the person is identified, by—

(I) delivering it to the person, or

(II) leaving it at the address—

(A) at which the person ordinarily resides,

(B) which, at the time of the alleged offence, the person gave to the member referred to in *subsection (1)* , …

or

(b) in the case of postal service—

(i) where the person is identified, by *posting it to the address* (inside or outside the State)—

(I) at which the person ordinarily resides,

(II) which, at the time of the alleged offence, the person gave to the member referred to in *subsection (1),* or

(III) at which the vehicle is registered, where the person is the registered owner of the vehicle at the time of the alleged offence,

…

15. I would draw particular attention to the words *"A prosecution… shall not be instituted unless a fixed charge notice…has been served on the person concerned under this section…."* within the above provisions (s.35(2)). In my view, this would on its face appear to make service of a s.35 fixed charge notice a precondition to prosecution.

16. Section 38 of the RTA 2010 (as amended) provides:

38.— (1) In a prosecution for a fixed charge offence it shall be presumed*, until the contrary is shown*, that—

(a) the relevant fixed charge notice—

(i) if being served personally or affixed to a vehicle, has been so served or affixed, or

(ii) if being served by post, has been so served where there is proof of posting or delivery of the notice,

...

(2) In any proceedings in respect of a fixed charge offence a document purporting to be a certificate or receipt of posting or delivery issued by or on behalf of An Post or another postal service is admissible in evidence as proof of the posting or delivery, as the case may be, of a fixed charge notice.

17. Therefore s.38(1) contains a presumption, which can be rebutted by showing "the contrary". What precisely is presumed and what can be rebutted, and whether and why this matters in a prosecution, is discussed further below.

18. Section 44 of the RTA 2010 (as amended) deals with the summons and s.44 (or second) fixed charge notice. I would draw particular attention to the provisions of s.44(10). Section 44 as amended is set out as follows:

44. — (1) Where a member of the Garda Síochána serves a person with a summons in respect of a fixed charge offence the member shall serve, or cause to be served, on the person, a notice under this section *('section 44 notice').*

(2) A *section 44* notice shall be served with, and in the same manner as, the summons in respect of the fixed charge offence to which the *section 44* notice relates.

(3) A section 44 notice —

(*a*) shall be in the prescribed form,

(b) shall contain details of the manner of payment of a fixed charge,

(*c*) may specify the person to whom, and the place where, the payment is to be made and whether the payment is to be accompanied by the notice, duly completed, and

(*d*) if it relates to a penalty point offence shall —

(i) require such details of the driving licence or learner permit held by the person on whom it is served as specified in the notice, and

(ii) contain a statement to the effect that if the person on whom it is served pays the fixed charge or is convicted of that offence, different specified numbers of penalty points will be endorsed on the entry of the person.

(4) *A section* 44 notice shall, without prejudice to the generality of *subsection* (1) , contain a statement to the effect that —

(a) the person on whom it is served is alleged to have committed an offence specified in the summons with which it is served,

(*b*) the person may, not later than 7 days before the date specified in the summons on which the person is required to appear in court, make a payment of a fixed charge of an amount stated in the notice in the manner specified in the notice,

(*c*) where the summons relates to a penalty point offence, if the person on whom it is served makes a payment in accordance with *paragraph* (*b*) or is convicted of that offence, different specified numbers of penalty points will be endorsed on the entry of the person, and

(*d*) if the person pays the fixed charge no proceedings in respect of the alleged offence will be continued and the person need not attend the court on the day specified in the summons.

(5) The fixed charge amount stated in a *section 44* notice shall be an amount 100 per cent greater than the prescribed amount stated in the fixed charge notice served on the person, in accordance with section 35, in respect of the fixed charge offence to which it relates.

(6) Where a *section 44* notice is served the person to whom it applies may, during the period specified in the notice and in accordance with the notice, make a payment specified in the notice.

(7) A payment under this section —

(a) may be received only within the period referred to in *subsection (4)(b)* and in accordance with the *section 44* notice, and

(b) is not recoverable by the persons paying it.

(8) The person receiving a payment under this section may issue a receipt for it.

(9) Where a person who has been served with a summons accompanied by a *section 44* notice makes a payment of a fixed charge in accordance with the notice, proceedings in respect of the alleged offence to which the notice relates shall be discontinued.

(*10*) *Where a person is served with a summons accompanied by a section 44 notice in respect of a fixed charge offence, it shall not be a defence for the person served with the summons to show that he or she was not served with a fixed charge notice in respect of the alleged offence in accordance with section 35* .

19. In my view, a reading of the above provisions presents an immediate conundrum; s.35(2) appears to say that service of a s.35 fixed charge notice is a precondition to prosecution, while s.44(10) says that it is not a defence to show that that the person was not served with a s.35 fixed charge notice. So, if the evidence establishes on the balance of probabilities that a person was not served with a s.35 fixed charge, what is a District Judge supposed to do? Is the judge to convict because of s.44(10), or acquit/dismiss because of s.35(2)? Or is there some grey area in-between? Does discretion come into the picture? Is there some subtle interpretation of the words “serve” and “service” which

accounts for the apparent contradiction? Is there some important difference between something being “a precondition” and something “not being a defence” that resolves the apparent conundrum? This will be explored further below, but my ultimate conclusions are that there is no interpretative escape hatch and that the current version of the legislation contains within itself an irreconcilable contradiction.

20. I note also that this Court has already confirmed that the plain meaning of s.44(10) is what it appears to say; namely, that a District Judge has no discretion to dismiss a case where the accused persons did not receive the fixed charge notice; in *DPP v. McLaughlin* [2019] IEHC 174, the High Court (Twomey J.) answered the question posed in the negative, where the question was as follows:

> “Notwithstanding Section 44 of the Road Traffic Act, 2010, do I have a residual discretion to dismiss the prosecution for speeding contrary to Section 47 of the Road Traffic Act, 1961, even though I have found the allegation proved, where I am satisfied that the accused did not receive actual notice of the fixed charge penalty notice (FCN)?”.

The Reliefs Sought

21. The applicants each claimed: (1) an order of *certiorari* quashing conviction; (2) a declaration that the combination of ss. 35, 36, 38 and 44(1) of the Road Traffic Act 2010 as amended are invalid having regard to the Constitution and, in particular, the right to fair trial under Article 38.1 and the right to held equal before the law and to fair procedures in Articles 40.1 and 40.3.1; and (3) in the alternative, a declaration that the provisions of s.44(1) of the Road Traffic Act 2010 as amended are invalid on the basis of the same Articles of the Constitution.

The evidence in the proceedings

22. The Court was provided with a transcript of each of the applicants’ hearings in the District Court. The following is a summary of what transpired in each of their cases.

23. The first applicant was summoned to answer the allegation that he held a mobile phone while being the driver of a mechanically propelled vehicle. He admitted holding the mobile phone while driving. However, he maintained that he had not received the initial fixed charge notice. He gave evidence and was cross-examined. The judge determined that the presumption in s.38(1) of the Act had been rebutted i.e. he accepted that the applicant had not in fact received the initial fixed charge notice. He convicted the applicant.

24. The second applicant was summoned to answer an allegation that she held a mobile phone while being the driver of a mechanically propelled vehicle. She admitted holding the phone but said that she had not received the initial fixed charge notice. She also said she would have paid it if she had received it. She was cross-examined. The matter was adjourned and on the resumed date, the Judge was informed of the provisions of s.44(10) of the Act. He also proceeded to convict the applicant.

25. Neither applicant explained why they did not pay the penalty imposed under the second (s.44) fixed charge notice (the notice which came with the summons), which would have

enabled them to avoid conviction and the mandatory five penalty points, but of course would also have involved their paying a fine higher than that required under the original s.35 fixed charge notice.

26. It is important to note that in each case the District Judge was satisfied on the evidence that the applicant had not in fact received the first s.35 fixed charge notice.

The architecture of the offence and its prosecution

27. I now wish to consider what I might call the architecture of the statutory provisions as they are currently constituted. For example, what is the relationship between the s.35 notice and what are sometimes described as "the ingredients of the offence"? In my view, it could not meaningfully be said that the service of a fixed charge notice is an ingredient of the offence of speeding or holding a phone while driving. The ingredients of the offence are matters such as driving, or being in charge of a vehicle, together with driving too fast or holding a phone at the same time.

28. On the other hand, just because something is not an ingredient of an offence does not mean that it is irrelevant to the prosecution for the offence in question. (This was the mistake made by the District Judge in the *Kinsella* case discussed below). Here, the legislature has chosen to create an important connection between the fixed charge notice regime and the regime of district court prosecutions for road traffic offences. This link is created primarily via the phrase "A prosecution… shall not be instituted unless…" in s.35(2). In my view, this makes service of the s.35 fixed charge notice a statutory precondition to prosecution. Accordingly, if one were preparing one's prosecution proofs going in to court, one would marshal the evidence not only to prove the ingredients of the offence (proof of the driving incident in question) but also to prove that the s.35 notice was posted.

29. If I am right to characterise service of a s.35 fixed charge notice as a precondition to prosecution, it seems to me that the decision *in Minister for Agriculture v. Norgro Ltd* [1980] 1 IR 155 is then of considerable importance to the analysis of the provisions, albeit that the decision in *Norgro* concerned a different type of statutory precondition to prosecution, namely a time limit issue. Before examining *Norgro*, another point to be made about the architecture of the statutory provisions governing prosecution is that the District Judge is to a degree circumscribed in sentencing once a person has been convicted. Counsel informed me that a mandatory five-penalty-point penalty must be imposed by the District Judge upon conviction.

30. Thus, the current regime has a particular architecture which includes the following features; a statutory precondition unrelated to the ingredients of the offence as a necessary precondition to prosecution and (at least one) mandatory aspect to the penalty imposed upon conviction. This architecture has been chosen by the Oireachtas and can be altered by the Oireachtas. For example, it is not necessary to link the service of a notice to the commencement of a prosecution; it could instead be linked with the penalty instead, leaving the criteria for conviction to be coupled only with the ingredients of the

offence, and reserving consideration the question of whether someone had earlier opportunities to pay a fixed charge notice until the sentencing stage.

The decision in Norgro and statutory preconditions to prosecution

31. The applicants placed considerable reliance upon *Minister for Agriculture v. Norgro Ltd* [1980] 1 IR 155, and in my view were correct to do so. In *Norgro*, the specific issue was the six-month time limit for making a complaint in a summary matter for the purpose of the issue of a summons pursuant s.10(4) of the Petty Sessions Act, 1851. The question was whether this time limit was a matter going to jurisdiction or a matter of defence, and the reason the distinction between 'jurisdiction' and 'defence' was important in that case was because the summons did not disclose on its face *when* the complaint been made and the prosecution wished to call evidence to establish that the complaint had as a matter of fact been made within the time-period of six months. The District Judge had determined that he could *not* hear evidence in relation to the matter but stated a case for the opinion of the High Court. The Court took a different view and held that the question of whether the complaint had been made within the six-month time limit was *a matter of defence* and therefore the prosecution could adduce evidence to deal with the issue, Finlay P. stating:-

> "…the issue which arises on the Case Stated as a matter of law is whether that is a matter of defence to be raised by the defendants and determined by the District Justice upon evidence (as the complainant contends), or whether it goes to the root of the jurisdiction of the District Court to enter upon a hearing of the complaint. I am satisfied that the contention of the complainant is correct and that the time limit arising under s. 10 of the Act of 1851 is a matter of defence for the defendants and does not go to the jurisdiction of the District Court to entertain the summons."

32. It seems to me that the decision in *Norgro* is highly relevant to the analysis of the fixed charge notice provisions; although it concerned a time-limit, it seems to me to have wider relevance as to how statutory preconditions to prosecution should be approached by a District Judge. Since *Norgro*, it has been generally accepted that as regards proof of a statutory precondition to prosecution, the correct procedure is that (a) the defendant must raise the issue i.e. call upon the prosecution to prove the issue; (b) the Court then hears evidence in relation to the matter (which may include both prosecution and defence evidence, depending on the issue) , and (c) then determines the issue on the basis of the evidence he or she has heard.

33. This approach was also confirmed in relation to a different statutory precondition (the existence of an order of the Revenue Commissioners permitting the commencement of proceedings for the recovery of fines and penalties under legislation relating to inland revenue) in *DPP v. Cunningham* [1989] IR 481. It was held that it was necessary for the prosecution affirmatively to prove the existence of such an order, but only if required by the defendant to do so.

34. In *Duff v. Mangan* [1994] 1 ILRM 91, the Supreme Court quoted with approval a passage from *State (Byrne) v. Plunkett* (unreported, High Court, D'Arcy J. 1st July, 1985) which

stated that the fact that the defence must raise the issue of the time-limit in s.10(4) does not mean that the defence must necessarily *prove* the issue; that depends on the wording of the provision and whether it alters the normal rule that the prosecution proves all matters beyond a reasonable doubt. As regards s.10(4) of the 1851 Act, once the defendant raised the issue, it is for the prosecution to call the evidence, it being a matter peculiarly within the knowledge of the prosecutor. (However, the burden of proof might be cast by a different legislative provision on a defendant to prove a particular matter; this does not alter the essential point that if the defence is successful, the outcome is an acquittal or a dismiss. In the legislation I am considering, the burden is differently cast, as discussed further below).

35. That the appropriate outcome is acquittal or dismiss following the failure to prove a statutory precondition to prosecution was addressed in *Curley v. Governor of Arbour Hill Prison* [2005] 3 IR 308, where Hardiman J. said:

> "In summary prosecutions it has long been held that a failure to demonstrate compliance with the general six-month time limit for the institution of a prosecution is a matter for the defence to raise, but if successfully raised *entitles the defendant to a dismiss."*

And, having referred to the decision in *Norgro* as well as the authorities therein referred to, he said:-

> "A consequence of these findings, of course, *was that if the complainant could not prove that he had complied with the time limit, the defendant would be entitled to a dismiss.* But if the matter was simply the subject of a finding of no jurisdiction it would be open to the complainant to come again assuming that, having been alerted to the difficulty, he could prove on the second occasion that he had complied with the time limit."

36. My understanding therefore of the effect of *Norgro* is that where a statute provides for a precondition to prosecution (i) the precondition is not a matter affecting the jurisdiction of the court to embark upon the hearing in the strict sense, but is rather a matter which should be raised as a defence by the defendant; (ii) once raised by the defence, evidence should be heard by the trier of fact on the issue; and (c) if the defence is successfully relied upon by the defendant to whatever appropriate standard of proof is required and/or the prosecution have failed to establish the matter to the necessary standard of proof, then the appropriate outcome is an acquittal or dismiss of the prosecution. I pause again to emphasise that if reliance upon the defence is successful, it is not a matter within the discretion of the trial judge, nor a matter going to mitigation of penalty, but rather a matter going to conviction or acquittal; either the defence is successful or it is not I will be disagreeing in this respect with the decisions in *Kinsella and Brown* discussed in the next section of this judgment.

Authorities relating to fixed charge notices

37. I was referred to several previous authorities concerning the relationship between the fixed charge notice scheme and prosecutions in the District Court. Particular issues were discussed in those cases, including the meaning of the terms "serve" and "service" within the legislation, the effect of the statutory presumption in what is now s.38(1) of the legislation, and the consequences of a failure to fulfil the requirement that a prosecution shall not be brought unless a fixed charge notice was served. These authorities concern the predecessor provisions to those currently under discussion.

38. In *DPP (O'Brien) v. Keith O'Sullivan* [2008] IEHC 375 (Charleton J.), there was a discussion as to the requirements of a valid fixed charge notice in circumstances where the District Judge had dismissed the charge by reason of errors on the face of the notice served. I agree with the submission of counsel on behalf of the applicant that the High Court judgment proceeded on the assumption that it was necessary to a valid prosecution that a valid fixed charge notice have been served; implicitly, the Court was considering the issue of validity precisely because it would have been fatal to the prosecution if the fixed charge notice had not been valid. However, as the Court found the notice in that case to be valid, it held that the summons was incorrectly dismissed. I do not, however, agree with counsel on behalf of the applicant that the same assumption permeates the judgment in *DPP (Dunne) v. McConville* [2014] IEHC 616; indeed, question (iii) in the questions had raised the issue but the Court explicitly left open the consequences for the prosecution if there had been a failure to serve a fixed charge notice.

39. Counsel drew my attention to two decisions of this Court on the fixed charge notice provisions in their pre-June 2018 incarnation; *Kinsella v DPP* [2018] IEHC 474 and *DPP v Brown* [2018] IEHC 471. While there are aspects of those cases with which I am entirely in agreement, I unfortunately have reached different conclusions on certain specific matters. I am conscious of the constraints upon this Court in departing from precedent of previous High Court decisions*; In the Matter of Worldport Ireland Limited (in Liquidation)* [2005] IEHC 189 and *Kadri v Governor of Wheatfield Prison* [2012] IESC 27, and I will explain the reasons for my disagreement below.

40. In *Kinsella v DPP* [2018] IEHC 474, the background to the High Court judgment was that the District Judge had refused to allow the accused person to raise the issue of service of the fixed charge notice at all. The District Judge had said that the fixed charge notice was an "administrative matter" with which the court should not be concerned and refused to hear any evidence in relation to the matter before proceeding to convict the motorist. The High Court disagreed with this view and concluded that the question of whether or not the fixed charge notice had been served should have been taken into account by the District Court. The Court granted *certiorari* of the conviction. I agree with much of what is said by the High Court in that judgment, but unfortunately I part company with my learned colleague McDermott J. insofar as he suggested that if the trial judge formed the view that the accused person had not received the fixed charge notice, he could then proceed to exercise a discretion. I also disagree with his interpretation of the terms "serve" and "service" insofar as he equated them with postage. On these points, the High Court followed an earlier decision of the Circuit Court in *DPP v. Kevin Tully* [2009] 7 JIC 1301.

41. I entirely agree with the passages in the judgment of McDermott J. where he expressed the view that the District Judge was wrong in in concluding that the history of the fixed penalty notice was irrelevant:

> "It is incorrect to state that the history of the fixed penalty notice is irrelevant to the trial of the charges set out in the summons. The statute clearly contemplates that the motorist charged with a fixed charge notice offence is entitled to raise the issue of the non-service of the notice or the payment of the charge before the court. The evidential burden of establishing that the charge was paid or the notice was not served was dealt with by way of presumption which is a legislative evidential tool to be deployed in the course of the trial. The existence of the provision itself demonstrates that the matters subject to the presumption may be raised in the course of the trial. Section 103(10) entitled the learned judge to presume until the contrary is shown that a relevant notice has been served or caused to be served and that a payment pursuant to the relevant notice accompanied by the notice duly completed, has not been made. Thus, the accused would be entitled to advance evidence that the penalty had been paid and that therefore the prosecution should not have been initiated at all and the summons dismissed. It seems to me that in those circumstances, the payment of the penalty within the prescribed period would afford a full defence to the charges laid not because the acts alleged had not been committed but because the payment was made. Similarly, an accused may claim that the summons was wrongly initiated within the time allowed for the payment of the penalty and that he is therefore entitled to succeed on the basis that the prosecution should not have been initiated during the course of the prescribed period."

And

> "I am not satisfied that it is appropriate simply for a trial judge to take the view that the issue of service of a fixed penalty notice is simply an administrative matter and of no relevance at all to the prosecution of the offences laid in the summonses . An accused is entitled to adduce evidence to the effect that he has not been served with the fixed penalty notice and did not therefore have the opportunity to discharge the fixed penalty within the prescribed period and that consequently it would be unfair if he were to be convicted without having been afforded the statutory opportunity to pay the fixed penalty. The evidential rule applicable to how that matter may be canvassed is contained in section 103(10)."

42. However, because of my understanding of the law arising from *Norgro* as set out above, I respectfully disagree with the judgment of McDermott J. as to the *consequence* of a finding that a person had not received the fixed charge notice. In a number of passages (which I believe are, strictly speaking, obiter), including the following, McDermott J. took the view that the appropriate course for a judge was to exercise discretion:

> "It may be that a trial judge would find that the facts set out in the summons were proven and convict the accused notwithstanding such submissions but he must

entertain the submission and hear the evidence. The issue may also be relevant to the penalty to be imposed if the accused is convicted and might reasonably, in appropriate circumstances provide a basis upon which a trial judge might mitigate the penalty to reflect the fact that the accused did not have the opportunity to pay the lesser sum at an earlier stage due to circumstances beyond his control. Alternatively, a trial judge might conclude that it would be entirely unfair to record a conviction against an accused who has successfully raised an issue as to service of the fixed penalty notice and dismiss the charge. I am satisfied that this is the 'discretion' contemplated in White J's judgment in the Tully case which is vested in the trial judge in relation to this issue and in that sense provides what may in some cases amount to a defence resulting in the dismissal of the charge. However, this does not preclude the trial judge from determining that he ought not to exercise his discretion if the facts constituting the ingredients of the offences are established beyond reasonable doubt and proceed to convict."

43. I disagree with the above because my understanding of *Norgro* is that once a *Norgro*-type-defence has been established, the accused person should be acquitted/charges dismissed and the question of exercising discretion does not arise. Further, it should be borne in mind that in the present context, at least one aspect of the penalty is mandatory (the 5 penalty points) and the judge could not exercise discretion to reduce this.

44. The relevant provisions were again considered in *DPP v Brown* [2018] IEHC 471, where the interpretation of the word 'serve' came under particular scrutiny. In *Tully*, Judge White (as he then was) had said that proof of postage was sufficient to show that the precondition had been complied with, and certain passages of his judgment had been set out in *Kinsella*. Having referred to those with approval, Burns J. then introduced s.25 of the Interpretation Act, 2005 into the discussion:-

> "This view, that proof of receipt of the Fixed Notice Penalty Charge, is not what is required to be established pursuant to s. 103(2)(a) of the 1961 Act as amended, but rather proof of posting, is bolstered when one considers s. 25 of the Interpretation Act, 2005 as set out above. Clearly, having regard to s. 25, serving a Fixed Charge Penalty Notice in accordance with s. 103 of the 1961 Act as amended, only requires that the document be properly addressed and posted to the address.
>
> Any question that this interpretation is inoperative as the State cannot know with accuracy the address of a person the subject matter of a Fixed Charge Penalty Notice, is of course answered by the notice requirements of Article 9(4) of the Road Vehicles (Registration and Licensing)(Amendment) Regulations 1992, cited above.
>
> The evidential presumptions created pursuant to s. 103(10) of the 1961 Act and s. 25 of the 2005 Act do not aid the Respondent in the manner asserted by him. The effect of the presumption in s. 103(10) has been considered, as set out above, by Mr Justice McDermott in *Kinsella v. DPP*. In summary, the effect of s. 103(10)(a) is that the presumption that a Fixed Charge Penalty Notice has been served can be rebutted in the course of the underlying proceedings for the alleged road traffic

offence. If the presumption is rebutted, the effect of same can then be considered. The options available to a District Court Judge in such a scenario have been set out by Mr Justice McDermott in *Kinsella* and are referred to with emphasis above. As is clear therefrom, non-receipt of the Fixed Charge Penalty Notice is not fatal to a prosecution for the underlying road traffic offence, but rather is something which must be considered in the manner as set out. The presumption in section 25 of the 2005 Act does not create a presumption of receipt. What is presumed (deemed) to have occurred pursuant to s. 25 is that service of the document was effected *at the time the letter would be delivered* in the ordinary course of post. Accordingly, the presumption relates to the time of delivery rather than creating a presumption of receipt.

It seems to me that the legislation is clear and unambiguous: service of a Fixed Charge Penalty Notice can be effected by posting it; proof of receipt is not required. However, this does not mean that evidence to the effect that the Notice was not received is not of importance. It is a matter which the District Court Judge can consider and balance with all of the evidence in the case, to determine what the import of same is, if any.

If receipt of the Fixed Penalty Charge Notice was what was required, the section, as very many provisions relating to service require, would have referred to service by 'registered' post. Clearly, this is not required by the terms of s. 103(2)(a).

Accordingly, I am of the view that the District Court Judge is not correct in his view that s. 103 of the 1961 Act requires proof of receipt of the Fixed Charge Penalty Notice. However, if non-receipt of the Notice arises in evidence, this is a matter which he can and should have regard to, in the manner set out above in *Kinsella v. DPP*, in light of the circumstances of the case."

45. Thus, Burns J. considered that "served" means "posted" in this context, and not "posted and received". Also, the view was again taken by the learned High Court judge that if a person could establish that he had not received a fixed charge notice, this would fall to be dealt with by the trial judge in his or her discretion.

46. Again, unfortunately, I find myself regrettably in a position of disagreement with my learned colleague Burns J. with regard to her conclusions regarding the exercise of discretion (which she took from the *Kinsella* decision) and the meaning of service in the legislation. I have already explained my interpretation of *Norgro* which is at odds with the concept of a District Judge exercising discretion if it has been established that a defence (failure to establish a statutory precondition) succeeds. As regards the meaning of the term "serve" and "service", I respectfully suggest that there has been a conflation of the position where the presumption has not been rebutted and the position where it has.

47. In my view, the natural and ordinary meaning of the presumption in what is now s.38(1) is as follows:

(i) If an accused person does not raise the issue of service, the prosecution proves postage of the s.35 fixed charge notice and that is the end of the matter because the presumption in s.38 operates to equate postage with service, deeming the date of service as being the date upon which the person would have received the letter in the ordinary course of post; the precondition in s.35(2) is thereby satisfied, and the court proceeds to hear the evidence about the alleged offence itself (such as speeding). Here the presumption has not been rebutted.

(ii) If an accused person does raise the issue of service, the matter of service now 'in issue' (in the *Norgro, Duff v. Mangan, Cunningham* sense). The prosecution in the first instance proves postage of the s.35 fixed charge notice. The presumption will operate to deem such postage 'service' if no further evidence is called. However, if the accused person, either through his own evidence or some other evidence, *proves* (i.e. establishes to the satisfaction of the court on the balance of probabilities) that he *did not receive* the s.35 fixed charge notice notwithstanding that it was posted to him, in this scenario the prosecution will have failed to prove 'service', the statutory precondition to prosecution will not have been proved, the person must be acquitted/charges dismissed. Here, the presumption has been rebutted.

I emphasise that the presumption in s.38(1) uses the phrase until the "contrary is proved"; this is a standard legislative phrase which indicates (i) that the presumption can be rebutted (i.e. it is not an irrebuttable presumption), (ii) that the burden falls on the accused person to rebut it; and (iii) that the standard of proof on the accused person in this regard is proof on the balance of probabilities. In my view it is important to note that the burden and standard of proof fall on the accused person under this provision to rebut the presumption (in contrast to the position in *Norgro*). This means, in practical terms, that the District Judge is required to evaluate the evidence presented before deciding whether the presumption has been rebutted in any given case and - in particular- *does not require a District Judge to acquit simply because an accused gets into the witness box and makes a bald claim that he or she did not receive the fixed charge notice*. I emphasise this because it may be that s.44(10) was introduced precisely because of a fear on the part of the Oireachtas of that happening, in other words, that the whole regime might be undermined on a widespread basis by people simply going to court and making bald unsubstantiated claims that they did not they did not receive the first s.35 notice. I referred earlier in my hypothetical example to the "chancer" Michelle; the fear may have been that the regime would be seriously undermined by the Michelles of this world pulling the wool over the eyes of District Judges. However, the rebuttable presumption in s.38(1) requires proof "to the contrary" by the accused person; this means that there is a robust protection against that happening, provided of course that District Judges are prepared to apply the presumption properly, apply the appropriate standard of proof to the entirety of the evidence, and are not unduly gullible. I see no reason to assume that District Judges would not apply the presumption appropriately.

48. The alternative interpretation of the presumption (the *Brown* interpretation) which equates "service" with "postage" seems to me to involve the rather illogical proposition that an accused person has to rebut the presumption by proving that the s.35 was not *posted*, despite the prosecution having proved that it was *posted*. It also begs the question as to why there is a rebuttable presumption in the provisions at all; if all that is required is proof of postage, why have the rebuttable presumption? The rebuttable presumption, in my view, only makes sense if one interprets the overall concept of service as involving a document being *sent* and received; with the presumption operating to *deem* the sending to also involve receipt (unless there is proof to the contrary); but allowing for the scenario of someone rebutting the presumption by proving that they did not in fact receive the document even though it was sent.

49. Taking account of the nomenclature employed by the Irish superior courts with regard to evidential presumptions in recent years (*People (DPP) v. Smyth* [2010] 3 IR 688, *People (DPP) v. Heffernan* [2017] 1 IR 82*, DPP v. Forsey* [2018] IESC 5) it seems to me that the presumption in s.38(1) places a legal burden upon the accused person to prove the relevant fact on the balance of probabilities i.e. that he or she did not receive the fixed charge notice notwithstanding that (as the prosecution will have proved) it was posted.

50. I should record that my views in relation to the decisions in *Kinsella* and *Brown* are in agreement with the submissions to this effect urged upon me by counsel for the applicants.

The effect of s.44(10) upon the fixed charge notice and prosecution regime

51. It will be recalled from above that s.44(10) provides as follows:-

> *Where a person is served with a summons accompanied by a section 44 notice in respect of a fixed charge offence, it shall not be a defence for the person served with the summons to show that he or she was not served with a fixed charge notice in respect of the alleged offence in accordance with section 35 .*

52. The words "it shall not be a defence…to show…" make it clear that if even if the person proves that he was not served with a s.35 notice, he is to be convicted. This renders the interpretation of the word "served" in the sub-section crucial. Counsel on behalf of the State submitted to the Court that the word "served" could be interpreted to have different meanings in s.35 and in s.44. Thus, it could mean "posted" in s.35 (in accordance with the interpretation in the *Kinsella* and *Brown* cases) and "received" in s.44. I have considered three different possibilities; (1) that the word "served" means different things ("posted" v. "posted and received") in s.35 and s.44 respectively; (2) that the word "served" means "posted" in both sections; and (3) that the word "served" means "posted and received" in both sections. One also has to factor in the rebuttable presumption in s.38(1) (which one cannot assume is merely a redundancy in the statute) and the use of the word "serve" therein. Further, it may be noted that s.44(10) was already in force at the time the judgments in *Kinsella* and *Brown* were delivered although the judgments concerned the predecessor provisions, and it cannot therefore be assumed that the

Oireachtas knew that the word “served” would be interpreted to mean “posted” when it enacted s.44(10).

53. In the first instance, I feel compelled to reject the suggestion made on behalf of the State that the word “serve” should be interpreted differently as between s.35 and s.44. It seems to me that it would be entirely contrary to ordinary principles of statutory interpretation if the Court were to interpret the word “served” differently not only in the same piece of legislation but across a group of legislative provisions which are, to use a metaphor, close neighbours in a tightly-knit neighbourhood of interlocking statutory provisions.

54. This leaves me with the alternative that “served” across all of the provisions under scrutiny here means either “posted” or “posting and received”. I have explained above why I cannot interpret “served” as “posted” in the context of my analysis of the rebuttable presumption in s.38(1), on the basis that it would make the rebuttable presumption meaningless. This leads me to the conclusion that “served” means “ posted and received” in both s.35(2) and s.44(10).

55. This in turn leads me to the conclusion that this presents the conundrum referred to at the outset of this judgment, not merely in appearance but also upon the closer examination conducted above. The conundrum is this: s.35(2) (combined with the standard *Norgro* approach to statutory preconditions) tells the judge to acquit/dismiss if the s.35 fixed charge notice was not served (i.e. posted by the Garda and received by the accused person), while s.44(10) tells the District Judge to *convict* even if the s.35 fixed charge notice was not served (i.e. posted by the Garda and received by the accused person). The two provisions contradict each other; the District Judge has to choose between applying one or the other but cannot apply both harmoniously.

56. I have tried to find an interpretation of s.35(2) and s.44(10) which renders them compatible with each other. For example, I have considered whether there might be some gap or difference between the failure to prove a precondition and positive proof of a defence which would explain away their apparent inconsistency with each other. Undoubtedly, there is a difference at an abstract or academic level between a precondition (or failure to prove a precondition) and a defence (positive proof of a defence); but in practical terms and in terms of the outcome (conviction or acquittal) I cannot see how the legislation can - with any coherence - make something (the receipt of a fixed charge notice) simultaneously both (a) something which is a precondition to prosecution and therefore has to be proved for the prosecution to succeed, and (b) something which is not a defence, and therefore cannot lead to an acquittal, even if the defence successfully proves that it did not happen.

57. Given those conclusions upon the legislative interpretation, the question then arises as to the impact of the Constitution upon it.

Locus Standi

58. I should say that an issue was raised by the respondents in respect of the locus standi of the applicants. I am not entirely clear as to the nature of the objection but insofar as it was premised on the assumption that "served" meant "posted" in s.35(1) and "received" in s.44(10), the objection falls away in light of my conclusion that this is incorrect. More simply, and perhaps simplistically on my own part, it seems to me that the applicants have *locus standi* to challenge legislative provisions when those very provisions were applied to them by a District Judge and resulted in their convictions.

The constitutional dimensions: The submissions on behalf of the parties

59. Counsel on behalf of the applicants relied upon the principle that the law must contain an appropriate degree of certainty, precision and accessibility, *inter alia* relying upon dicta of Charleton J. *Sweeney v. Ireland* [2019] IESC 39. Counsel on behalf of the applicants submitted that there had been a breach of the constitutional guarantee of equality insofar as it created invidious discrimination as between different categories of offending motorists, citing *In re the Employment Equality Bill Reference* [1997] 2 IR 321*, McMahon v Leahy* [1984] IR 525, *Blascaod Mor Teo v. Commission for Public Works (No. 3*) [2000] 1 IR 6, *Kelly v Minister for the Environment* [2002] 4 IR 191*, G v. District Judge Murphy* [2011] IEHC 445 as well as (in relation to equality in the context of sentencing) *Brehuta v. DPP* [2012] IEHC 498, *Ellis v Minister for Justice and Equality* [2019] IESC 30. For the "parity principle", counsel relied upon *People (DPP) v. Duffy* [2003] 2 IR 192 and *DPP v. Daly* [2011] IECCA 104.

60. Counsel on behalf of the respondents submitted that the applicants lacked locus standi and relied upon the de *minimis* principle insofar as the claim was rooted in a difference between a €60 fine and €120 fine (referring, for example, to *Murtagh v Board of Management of St. Emer's National School* [1991] 1 IR 482, and *Dillon v Board of Management of CUS* [2018] IECA 292). As regards the equality claim, the respondents characterised the factual substratum as the difference between the fine at s.35 stage and the fine at s.44 stage and it was submitted that the case-law on the equality guarantee did not support the contention that there had been a breach of the guarantee (citing *Blascaod Mor Teo v. Commissioners of Public Works (No. 3)* [2000] 1 IR 6, *Quinn's Supermarket v. Attorney General* [1972] IR 1, *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, *J.D. v Residential Institutions Redress Board* [2010] 1 IR 262, and *Quigley v. Minister for Education* [2012] IEHC 414). Reliance was also placed on certain authorities in the sentencing area; *Enright v. Ireland* [2003] 2 IR 321, *M.G. v. Director of Oberstown Children Detention Centre* [2019] IEHC 275, and *Ellis v Minister for Justice and Equality* [2019] IESC 30. It was also submitted that the legislation was a reasonable and proportionate response to certain policy problems and issues (citing cases such as *Heaney v. Ireland* [1994] 3 IR 593, *Re Article 26 and the Employment Equality Bill* [1997] 2 IR 321, *Rock v. Ireland* [1997] 3 IR 484, Enright v. Ireland [2003] 2 IR 321 and *Minister for Justice and Equality v. Ostrowksi* [2013] 4 IR 206.)

Decision of the Court on the constitutionality of s.44(10)

Contradictory provisions

61. Although the case was primarily argued on the basis of inequality as between categories of motorists, it seems to me that the fundamental problem with the legislative provisions as currently configured is one of internal contradiction. I have set out my views on the legislative interpretation of s.44(1) and s.35(2) above (which necessitated views on s.38(1) also). My conclusion was that "serve" means "was posted and received" in both s.35(2) and s.44(10) as well as in s.38 (where the presumption is that a document posted was also received, but this presumption can be rebutted). This creates the conundrum referred to earlier in this judgment; namely that, on the one hand, s.35(2) (combined with the Norgro line of authority) tells the judge to *acquit/dismiss* if the s.35 fixed charge notice was not served (i.e. posted by the Garda and received by the accused person) because a statutory precondition has not been complied with, while, on the other hand, s.44(10) tells the District Judge to convict even if the s.35 fixed charge notice was not served (i.e. posted by the Garda and received by the accused person) because failure to serve is not a defence. My view is that this inherent contradiction between s.44(10) and s.35(2) means that a trial conducted while these provisions are simultaneously in force cannot be a fair trial within the meaning of Article 38.1 of the Constitution. The law must be reasonably certain and foreseeable, and that condition is not satisfied if a person facing prosecution cannot reasonably foresee what circumstances will lead to his or her conviction, on the one hand, or an acquittal, on the other. Here, one provision signposts an acquittal/dismiss on the non-fulfilment of a particular condition, while another provision signposts a conviction upon the non-fulfilment of the same condition. It seems to be that this is contradictory and incoherent; the Oireachtas must decide whether or not it wants the service of a fixed charge notice to be linked with the prosecution or not; it cannot have its cake and eat it too. Different considerations would apply, and a different analysis would have to be conducted, if the legislation did not make service of the fixed charge notice a precondition to prosecution and still contained a provision such as s.44(10), but in my view that is a different situation to the one which arises here where two provisions concerning the same issue point in opposite directions. That the provisions of criminal law must reach a minimum acceptable level of clarity and accessibility is a well-established principle both under the Constitution and the European Convention on Human Rights; *King v. Attorney General* [1981] 1 IR 233, *DPP v. Cagney* [2008] 2 IR 111, Dokie v. DPP [2011]1 IR 805, and. *Douglas v. DPP* [2013] IEHC 343.

62. The problem created by the introduction of s.44(10) might also be characterised in legal terms as crossing an impermissible line when one considers the prohibition on impermissible interferences with the evaluation of evidence by judges (classically, *Maher v. Attorney General* [1972] 1 IR 1). The entire regime of fixed charge penalties consists of an elaborate system by which an erring motorist is offered incentives to avoid going to court; the carrot-and-stick approach described earlier. Part of this regime involves the State offering each suspected offender the same incentives (or carrots). The legislation (s.35(2)) requires that a prosecution not be initiated unless the motorist has been offered the first pair of carrots (the €60 and €90 penalties). The issue of whether this has been done given to the District Judge to evaluate on the evidence in the case; and s.38(1) gives (unobjectionable) guidance to the judge as to how to approach this evidential issue. However, s.44(10) then in effect dictates to the judge that in the event of a particular

finding of fact, he or she should convict notwithstanding what is said in s.35(2) and in that regard seems to me to transgress the permissible boundary as between executive and judicial functions.

63. Incidentally, I should perhaps say that it makes no difference if I was incorrect above in my conclusion that "served" means "posted and received" in ss.35, 38 and 44, and if the correct meaning of "served" is "posted" only. There would still be the same contradiction as between s.35(2) and s.44(10), although it would in my view introduce the additional complication that s.38(1) would no longer make any sense.

64. It is perhaps worth pausing to consider why s.44(10) was introduced. What was this particular sub-section (as distinct from the entirety of s.44) seeking to achieve? One explanation for the introduction of s.44(10) may have been that the Oireachtas was concerned that the carefully constructed carrot-and-stick regime could be sabotaged or undermined by accused persons simply claiming that they did not receive a fixed charge notice and thereby being acquitted by gullible District Judges. In other words, it may have been feared that that the "chancers" of this world (Michelle in my hypothetical example) could undermine the whole system to the point that it was unworkable. I am not convinced that this is a real problem requiring resolution if the presumption in s.38(1) is properly applied by a trial judge and as described above. Alternatively, requiring service to be effected by registered post might be another solution to this potential problem.

65. Another possible reason for the introduction of s.44(10) is that it may have been thought that it would be unfair that a person would escape conviction and therefore any penalty at all in circumstances where he or she had actually committed the offence but had not received the s.35 fixed charge notice in the post. This perceived problem is premised on the view that there is only one binary choice available to the Oireachtas in respect of those who convince the court they did not receive the s.35 fixed charge notice; (1) acquittal; or (2) conviction with the penalties as they currently stand. It is a consequence, perhaps, of the architecture of the regime as it currently stands in which the Oireachtas has chosen to make service of the fixed charge notice a precondition to prosecution and has limited the District Judge's discretion regarding the penalty to be applied upon conviction. However, I think it likely that the architecture of the regime can be adjusted in order to side-step this binary choice.

66. None of the above is strictly relevant to my conclusion that the legislation is incompatible with the guarantee of a fair trial under the Constitution because my conclusion does not (and could not validly) rest upon any view that the Oireachtas could come up with a "better" set of provisions, but instead rests upon my view that the existing set of provisions is internally inconsistent and self-contradictory and therefore falls short of creating a regime which is compliance with the guarantee of trial in due course of law under Article 38.1 of the Constitution. Nonetheless, the comments may perhaps by worthy of some consideration if the Oireachtas were to consider amending the legislation.

The equality arguments

67. I have found the equality argument difficult to analyse in this case, perhaps for two reasons; (1) because of the interpretative challenges discussed above; and (2) because the applicants brought their case in circumstances where they had chosen (for reasons unexplained) to answer the summons in court rather than pay the €120 fine when they received the s.44 notice. Thus, the State emphasised the difference between the s.35 and s.44 penalties, while the applicant emphasised the difference between the s.35 penalty and the penalty imposed upon conviction.

68. It is perhaps appropriate to recall that the equality guarantee does have application to the processes of criminal trial and sentencing, notwithstanding that some doubt cast on this proposition by counsel on behalf of the State during the hearing of this case. That the equality guarantee is not irrelevant to sentencing provisions has been discussed in a number of cases. Hogan J. in *Byrne v. Director of Oberstown School* [2013] IEHC 562 provided a useful summary of some of the leading cases in the following terms:

> "There is little doubt but that the guarantee of equality in Article 40.1 of the Constitution applies to legislation governing the sentencing process. Thus, for example. in *Cox v. Ireland* [1992] 2 I.R. 503 the Supreme Court held that s. 34 of the Offences against the State Act (which allowed for the forfeiture of the pension rights of public servants convicted of certain offences at the Special Criminal Court) was unconstitutional because it was "impermissibly wide and indiscriminate". A similar approach was expressly adopted by Laffoy J. in *SM v. Ireland (No.2)* [2007] IEHC 280. [2007] 4 I.R. 369 (where legislation which provided for an enhanced penalty if the victim of a sexual offence was greater if the victim was male was held to infringe Article 40.1) and by myself in *BG v. Murphy (No.2)* [2011] IEHC 445, [2011] 3 I.R. 748 (where legislation which inadvertently discriminated unfairly against persons whose fitness to plead was in doubt was held to offend against Article 40.1).
>
> 26. It is thus clear that a law which differentiated between offenders so far as eligibility for remission is concerned engages in the first instance the application of Article 40.1. Thus, for example, the Oireachtas could scarcely differentiate so far as a sentence remission regime is concerned as between adult prisoners on the grounds, for example, of prison venue or gender, since, absent special circumstances at least, the objective justification for such differentiation would be difficult to discern."

49. Further, O'Donnell J. in *Murphy v Ireland* [2014] IESC 19 discussed the type of differentiation which might breach the equality guarantee and considered it not to be necessarily limited to matters such as gender, race, religion and so on:

> "Matters such as gender, race, religion, marital status and political affiliation, while not all immutable characteristics, can nevertheless be said to be intrinsic to human beings' sense of themselves. Differentiation on any of these grounds, while not prohibited, must be demonstrated to comply with the principles of equality. This is the sense in which the principle of equality is most commonly employed in

constitutions and international instruments. It is plain however, that no discrimination on such grounds exists, or is alleged, in this case.

Nonetheless, Article 40.1 is in general terms and *accordingly it may be that significant differentiations between citizens, although not based on any of the grounds set out above, may still fall foul of the provision* if they cannot be justified. It is unnecessary here to seek to determine the level of scrutiny the Constitution would require to be applied to any particular differentiation in the absence of one of the factors identified above. The principle of equality in general terms requires that like persons should be treated alike, and different persons treated differently, by reference to the manner in which they are distinct. Here it is plain that the plaintiff is being treated *differently* from other persons charged with offences against the Taxes Consolidation Act."

69. Accordingly, it is in principle possible to have a breach of the constitutional guarantee of equality in the criminal trial/sentencing arena where the differential treatment of offenders is based upon some arbitrary factor. Is that the case here? And for the purpose of conducting the analysis, what is the relevant comparator group to be compared with the applicants' situation? Oddly enough, this is perhaps not as simple as it might first appear.

70. It may be helpful if we return to the cast of characters outlined in my hypothetical example earlier. It is also necessary to remember that in each of the applicants' cases, the District Judge had found as fact that the accused person had not received the s.35 fixed charge notice but convicted and applied a fine together with the mandatory five penalty points. The situation of the applicants in the present case is therefore aligned with that of Brendan in my hypothetical example.

71. The applicants say that the relevant comparator is David, who was able to walk away from his offence with an early payment of €60 and three penalty points, while they (like Brendan in the example) walk away with a criminal conviction, a fine and five penalty points. They say this is unfair, and more specifically in breach of the principle of equality, because the only difference between them is that David received his first fixed charge notice and they did not, and that this difference was due to a circumstance beyond their own control, which renders the difference in treatment between them arbitrary. Or they might say that another relevant comparator is Lucy, who chose not to pay either the s.35 notice or the s.44 notice; they would say that it is unfair that the judge was forced to treat both of them in the same way whereas an important difference between them is that they did not have the first opportunity to pay at the level of a €60 fine as both David and Lucy did.

72. Matters are not that simple, however. One has only to consider the position of Fedelma, who, like the applicants, did not receive the first fixed charge notice but chose to pay the second fixed charge notice and thereby avoided going to court. This points up the fact that the applicants *chose* to go to court by failing to pay the second fixed charge notice. Therefore it is not entirely correct for them to say that the only difference between them

and someone like David is that they did not receive the first fixed charge notice; there was also an element of choice involved on their part insofar as they chose not to pay the second notice, thereby triggering their court appearance on foot of the summons. But it is also true to say that while they had an opportunity to pay an earlier fine to avoid going to court, it was not as good an opportunity as that offered by the first fixed charge notice which they did not receive.

73. Would a person in the position of Fedelma in the hypothetical example (i.e. the person who pays the €120 penalty under the s.44 notice even though she did not receive the opportunity to pay the smaller fines under the s.35 notice because she never received it) have a legitimate complaint on grounds of inequality *vis a vis* someone in David's position? In other words, would the difference between a €120 penalty and a €60 penalty ground an equality argument? In my view, it would not. I would take the view that this would indeed fall into a *de minimis* category of differential treatment, as submitted by the respondents. If that is so, how then can the applicants *improve* their equality argument by failing to pay on foot of the second s.44 notice and going to court, thereby incurring the higher penalties through the exercise of a choice on their own part? I think they cannot.

74. A further consideration is that there is no invidious discrimination on the face of the legislative provision in question. The legislation contains no provision which in effect says: "The penalty upon conviction is the same for people who received the first fixed charge notice and for those who did not". On the contrary, it seems to me that the legislature intended that the increased penalties upon conviction would fall only upon those in the position of my hypothetical Lucy i.e. motorists who received both notices and chose not to pay either of them. If there is arbitrary differential impact on the applicants as compared with the person in the position of David in my example, it is because of an intervening event in the real world (the non-delivery of the letter posted) which meant that the legislative intention (with regard to penalty following prosecution and conviction for someone who had failed to take advantage of two separate opportunities to pay their way out of going to court) was thwarted by the happenstance of a postal issue, rather than it was fulfilled.

75. I am also conscious that this judicial review has been focussed on s.44(10) of the legislation, rather than the penalty provisions. If there is a problem of unfairness by reason of the imposition of a mandatory five-point penalty, it seems to me to arise from a combination of provisions including the penalty provisions rather than from s.44(10) alone.

76. In all the circumstances, I am not persuaded that the applicants have succeeded in demonstrating that s.44(10) of the legislation is in breach of the equality guarantee in Article 40.1 of the Constitution or that it would be appropriate to grant the relief sought on this particular ground. Insofar as the Oireachtas is responsible for a differential effect - as between the s.35 fine and the s.44 fine -, this in my view falls within the *de minimis* principle; but insofar as the applicants seek to rely upon the penalty received by them

upon conviction, this resulted at least in part from their own decision to fight the case in court rather than pay the s.44 notice, something which cannot be laid at the door of the Oireachtas.

77. Accordingly, while I have reached the conclusion that the applicants did not have a fair trial in accordance with Article 38.1 of the Constitution, I limit the basis of my decision to a finding of a breach of the Article 38.1 guarantee of a fair trial on the basis of the existence of contradictory provisions as described above. Nonetheless, the points made earlier in connection with possible amendments to the legislation are equally applicable here, even if the regime could not be said to contain invidious discrimination within the meaning of Article 40.1, insofar as the conferring of a degree of discretion upon a District Judge in sentencing might ensure that he or she always retains a discretion to address the various practical situations which may arise.

Conclusion

78. My conclusion is that s.44(10) of the 2010 Act as amended is not compatible with Article 38.1 of the Constitution. This destination was reached by stepping on a number of stones along the way, including; my view that the word “served” in ss. 35, 38 and 44 of the legislation should be interpreted consistently; that “served” means “posted and received”; that the presumption in s.38 means that “posted” is deemed to be good service unless and until the contrary is proved by the accused person i.e. that he or she did not “receive” the document; and that s.44(10) has the effect of creating an internal contradiction in the legislative regime such that if a motorist proves he or she was not served, one provision tells the District Judge to dismiss while the other tells him to convict; and that this rendered the applicant’s trial other than one conducted in accordance with the guarantee of trial in due course of law in accordance with Article 38.1. I reject the submission, however, that the provisions involved a breach of the equality guarantee under Article 40.1 of the Constitution.