

**THE HIGH COURT
JUDICIAL REVIEW**

[2024] IEHC 67

Record No. 2021 497 JR

BETWEEN:

FLORIN MAZARACHE

APPLICANT

-AND-

**THE COMMISSIONER OF AN GARDA SIOCHANA AND THE DIRECTOR OF
PUBLIC PROSECUTIONS AND THE MINISTER FOR HEALTH**

RESPONDENT

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2021 502 JR

BETWEEN:

NICOLAE MAZARACHE

APPLICANT

-AND-

**THE COMMISSIONER OF AN GARDA SIOCHANA AND THE DIRECTOR OF
PUBLIC PROSECUTIONS AND THE MINISTER FOR HEALTH**

RESPONDENT

Judgment delivered by Ms Justice Nuala Jackson on the 17th January 2023.

INTRODUCTION

1. The matter at issue herein is a net issue but an important one. Although two reliefs were sought in the Statement of Grounds, at hearing it was conceded that that only one such was being progressed namely:

“An injunction by way of an application for Judicial Review restraining the respondents their servants or agents or any person having notice of same from taking any steps to prosecute the applicant for any offence arising from his failure to make the fixed payment provided for in the impugned Notice, the Notice in question being a Fixed Payment Notice (‘FPN’) pursuant to Section 31C of the Health Act, 1947 as amended.”

2. The Applicants in these two identical sets of proceedings assert that there has been procedural unfairness on the part of the Respondent prosecuting authorities such that injunctive relief as aforementioned is appropriate because:
 - (i) The FPN alleges an offence under Section 31A(6)(a) and 31A(12) of the Health Act 1947 as amended (‘the 1947 Act’) without specifying the offence in question;
 - (ii) The FPN is therefore bad on its face for want of specificity;
 - (iii) The FPN impugned herein does not sufficiently state the particulars of the alleged offence as required by Section 31C(1)(b) of the 1947 Act as amended.
 - (iv) The applicant is at risk of being prosecuted for failure to pay a charge of €2,000 in respect of an offence the details of which are not specified adequately or at all.
3. While the Statement of Grounds refers to a failure to show jurisdiction on the face of the FPN, it was accepted by the Applicants at the hearing that this was not an applicable ground in the circumstances of the present case and no such argument was proceeded with at hearing.

4. The factual background to this matter involves the Covid pandemic and restrictions imposed at that time. Section 31A of the 1947 Act permitted the making of regulations by the Minister in the context of the public health risks posed at that time. Such regulations were made by the Minister. Section 31A(6) of the 1947 Act provides, *inter alia*, that ‘a person who contravenes a provision of a regulation made under subsection (1) that is stated to be a penal provision, ... shall be guilty of an offence.’ In the circumstances of such offences, Section 31C of the 1947 Act provides for a “fixed payment notice” (‘FPN’) regime. As this provision is at the kernel of the present case, I will recite Section 31C in full:

31C. (1) Where a member of the Garda Síochána has reasonable grounds for believing that a person has committed an offence consisting of a contravention of a fixed penalty provision, that member may give to the person a notice in writing (in this section referred to as a "fixed payment notice") in the prescribed form stating—

(a) that the person is alleged to have committed that offence,

(b) particulars of that alleged offence,

(c) that the person may, during the period of 28 days beginning on the date of the notice, make to such person as is specified in the notice at such place as is so specified a payment of such amount as may be prescribed being an amount of not more than F55[€2,000], accompanied by the notice,

(d) that the person is not obliged to make the payment specified in the notice, and

(e) that a prosecution of the person to whom the notice is given in respect of the alleged offence will not be instituted during the period of 28 days beginning on the date of the notice and, that if the payment specified in the notice is made during that period, no prosecution in respect of the alleged offence will be instituted.

(2) Where a fixed payment notice is given under subsection (1)—

(a) the person to whom it applies may, during the period of 28 days beginning on the date of the notice, make to such person, and at such place, as is specified in the notice the payment specified in the notice, accompanied by the notice,

(b) the person specified in the notice may, upon receipt of the payment, issue a receipt for it and any payment so received shall not be recoverable by the person who made it, and

(c) a prosecution in respect of the alleged offence shall not be instituted in the period specified in the notice, and if the payment so specified is made during that period, no prosecution in respect of the alleged offence shall be instituted.

(3) In proceedings for an offence consisting of a contravention of a penal provision it shall be a defence for the defendant to prove that he or she made a payment, in accordance with this section, pursuant to a fixed payment notice issued in respect of that offence.

(4) Moneys received pursuant to the giving of a fixed payment notice shall be paid into or disposed of for the benefit of the Exchequer.

(5) A fixed payment notice may be given to a person in one of the following ways:

(a) by giving it in person to the person;

(b) by sending it by post to the address at which the person ordinarily resides.

(6) For the purpose of this section, a company within the meaning of the Companies Act 2014 shall be deemed to be ordinarily resident at its registered office, and every other body corporate and every unincorporated body of persons shall be deemed to be ordinarily resident at its principal office or place of business.

5. There are a number of notable features of this statutory provision:

A. It is a discretionary regime, the discretion being vested in a member of the Garda Síochána. In this regard, these legislative provisions differ from others in this jurisdiction providing for fixed payment notices, particularly those in the context of road traffic offences, where such notices are mandatory in nature. During the course of the hearing, I enquired of Counsel for both sides as to whether they were aware of any other legislation in which provision for FPNs on a discretionary basis was made and the answer was in the negative. Having regard to the jurisprudence in relation to mandatory fixed payment notices, one of the main challenges in the context of the within application is to determine the extent, if any, to which the discretionary nature of the FPN herein is relevant to the issues under consideration herein. It should be stated that fixed charge notices, the use of which is in the discretion of the police authorities, have been considered by the English courts and it is clear from these decisions that the objectives sought to be achieved through such notices is the same whether their invocation is mandatory or discretionary. *R v Gore; R v Maher* [2009] EWCA Crim 1424 concerned whether, subsequent to the exercise of such a discretion, prosecution could proceed for more serious offences arising from the same incident. Discussing the nature of a FPN and the distinction between service of such a notice and being charged with a criminal offence, Simon LCJ stated:

“9. Thus, the notice provides the opportunity to a potential defendant to discharge any possible liability to conviction on payment of the penalty. The liability is discharged on payment of the penalty.”

He continued:

“11. The penalty notice scheme provides a useful method for dealing with low level crime, for example, the sort of public disorder which occurs in city centres at night, which is troublesome and anti-social, without involving serious criminality. Payment of the penalty involves no admission of guilt on the part of the person to whom it is given, nor does not create a criminal record. These are important limitations.”

Unlike when an accused is charged, with the FPN there is no admission of guilt and no criminal record is created. As stated by Thomas LJ in **R v. Hamer** [2010] EWCA Crim 2053, which also involved such notice issued at the discretion of the police authorities:

“15. It is quite clear that the issue of a notice is not a conviction. It is not an admission of guilt nor any proof that a crime has been committed. The scheme of the Act makes that clear. Any person reading the form would plainly understand that it is not to be regarded as a conviction and will not be held against him save in the respect mentioned. It seems therefore clear, both as a matter of the statutory scheme and as a matter of what a person accepting such a notice would reasonably be led to believe, that he was not admitting any offence, not admitting any criminality, and would not have any stain imputed to his character.”

A similar analysis, albeit in the context of mandatory notices, is clear from the judgment of Ferriter J. in **Cully v. The Minister for Transport, Tourism and Sport and Others** [2022] IEHC 113 where it is stated:

“The fixed charge notice is not a summons or otherwise the formal commencement of the prosecution of a criminal charge. Acceptance of the penalties specified in the notice does not lead to a criminal conviction; indeed, such acceptance avoids prosecution and conviction.”

- B. The legislation provides for a pre-requisite to the exercise of the jurisdiction granted by the section being that “a member of the Garda Siochana has reasonable grounds for believing that a person has committed an offence consisting of a contravention of a fixed penalty provision”;
- C. The member concerned may then give to the person a notice in writing which offers them the option of paying an FPN.
- D. The notice in writing must be in a prescribed form (and such prescription can be found in Health Act 1947 (Fixed Payment Notice and Dwelling Event Provisions) (Covid-19) Regulations, 2021 SI No. 170 of 2021 which has a

template for the form concerned set out in Schedule 2 of the Regulations).

Under the heading “Alleged Offence”, the template form provides:

“It is alleged that you have committed an offence (specify offence) on (insert date) at (insert time) of (insert location)”.

- E. The primary legislation provides, in respect of the detail or particularity of the offence, that the notice in writing state:
 - (a) That the person is alleged to have committed “that offence” which must be taken to mean that the person is alleged to have committed “an offence consisting of a contravention of a fixed penalty provision”;
 - (b) Particulars of that alleged offence.

- F. The primary legislation (Section 31C of the 1947 Act) goes on to outline the precise impact of the giving of such notice, entitling, but not obliging (section 31C(1)(c)), the person concerned to pay a sum set out therein within a 28 day period and states that no prosecution will commence within the 28 day period and no prosecution will commence at all in respect of the alleged offence if the sum specified is paid within that period. That payment was made pursuant to the FPN is expressly stated to be a defence in proceedings although in this situation it is stated that the onus of so proving is on the defendant. (Section 31C(3)).

- G. The primary legislation makes it clear that the terms of section 31C(1) are to be stated in the notice served and the Regulations made thereunder provide for a template form in compliance with these provisions.

THE FACTS

- 6. The complaint of the Applicants herein essentially stems from, they assert, the failure of the fixed payment notices to either specify the offence which it is alleged has been committed or to particularise same. They assert that a fundamental unfairness has been thus occasioned in that they were not provided with sufficient information to enable them to determine the allegations being made against them and to assess same in order

to decide whether to make payment under the FPN and thereby avoid court proceedings or not to do so and to proceed to court if prosecuted, at which time there would be a full hearing in respect of the charge before the District Court.

7. It is important to bear in mind that the sums involved in these instances are far from trivial. The FPN provides for the payment of a sum of €2,000. The person could fare better or worse if the matter proceeded to the District Court. Obviously, the case could be successfully contested resulting in an acquittal. Alternatively, if convicted, a fine not exceeding €4,000 or imprisonment for a term not exceeding one month or both could be ordered (in respect of a first offence – the statute makes provision for larger penalties for subsequent offences). However, this is the maximum penalty. The District Court has a discretion in this regard and, indeed, such penalty could be less than the sum payable under the FPN. Of course, it must also be borne in mind that while a lesser penalty than the amount set out in the FPN might be imposed, this would be done in the context of a conviction whereas there is no such outcome following on from payment in accordance with the FPN. Obviously, payment pursuant to the FPN would also avoid a prosecution before the District Court subject always to the entitlement of the person to vindicate their constitutional rights in the context of a court hearing.
8. The issue for determination herein is whether there has been a failure to sufficiently specify and particularise the offence concerned in the FNP and, if so, whether the failure on the part of the member of An Garda Síochána who decided to avail of the FNP procedure herein to specify the offence concerned and to fully particularise it constitutes such a lack of fairness to the Applicants that the relief sought herein should be granted. The Respondent argues that there is sufficient specificity and particularity and, if there is not, that this is a matter which can be dealt with by the District Court at the subsequent trial.
9. The Applicants herein did not pay in accordance with the FPNs received by them but rather sought judicial review in respect of same. In this context, the 28 day period during which the FPN option may be availed of has expired and a complaint was made and a summons has issued before the District Court. There is a stay on the District Court proceedings pending resolution of the within proceedings. The FPN herein has been exhibited and is before me. Under the heading “Alleged Offence”, that Notice states:

“It is alleged that you have committed an offence Movement of persons Airport/Port – Contrary to Section 31A(6)(a) and section 31A(12) of the Health Act 1947 as amended, on 17/04/2021 at 16:55 at DUBLIN AIRPORT, DUBLIN DUBLIN.”

10. I am of the view that, for clarity, it should be noted that the subsequent summons was also exhibited and the said summons states:

“On the 17/04/2021 at Dublin Airport, Dublin Dublin in SAID DISTRICT without reasonable excuse, did travel to an airport or port for the purpose of leaving the State in contravention of Regulation 5(1) of the Health Act 1947 (Section 31A – Temporary Restrictions).”

11. I do not believe that any argument may be made as to the requisite degree of detail being contained in the summons and none such was made. It is clear that there is a very significant difference between the detail in the FPN and in the subsequent summons.

12. The factual background to the present proceedings has been set out in affidavits filed although it must be remarked that certain of the affidavits herein were of limited assistance in circumstances in which many of the averments consisted of submissions and general speculation. The affidavits of the Applicants aver that the Applicants travelled to Dublin Airport on or about the 17th April 2021 with the intention of travelling to Spain. The Applicants state that their trip was with the intention of visiting family in that country. The Applicants state that they were stopped by a Member of An Garda Siochana who informed them that if they did so, there would be a €2,000 fine. The Applicants state that upon being so informed, they stated that they would not travel due to the pandemic and that the Member of An Garda Siochana replied that they could in fact travel and took their details. The Applicants depose that they understood from this that they could travel without incurring a fine.

13. A FPN was subsequently received. Based upon their own averments, it must be accepted that the factual circumstances referenced in paragraph 12 above were known to them when the FPN was received.

14. No affidavit has been filed by the Member of An Garda Siochana who was involved in this exchange at the airport and therefore the account is unchallenged. Of course, what the Applicants understood from the conversation and what the Garda member intended may not have been *ad idem* but no information in this regard has been adduced before me. The Respondents say that insofar as there are disputes of fact between the parties, these are matters to be determined by the District Court. What is clear is that the Applicants were at Dublin Airport on the date in question and they had a conversation with An Garda Siochana about pandemic related travel restrictions and fines arising in this context formed some part of this conversation. The Respondents assert that it is clear on the Applicants' own accounts that they were in contravention of Regulation 5(1) of the Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) Regulations 2021 (SI 168 of 2021) as they did not travel to Dublin Airport for an authorised purpose. The Respondents contend that such was the publicity attached to the restrictions on civil activities at this time that the Applicants “cannot but have been acutely aware” of the restrictions imposed by the Regulations.

15. The FPNs received, as set out above, did not refer to the Regulation allegedly breached and, in an affidavit sworn by the solicitor for the Applicants, he avers to the fact that 90 regulations were made under Section 31A of the 1947 Act. The Respondents state that the FPN was sufficient in that it sufficiently particularised the offence engaged and that it was not necessary to specify the Regulation allegedly breached but reciting the primary legislation sufficed.

THE LEGAL ISSUES ARISING

16. In consequence, there are three distinct issues for consideration by me:

1. Is the FPN deficient in its contents?
2. If so, is there a lack of specificity such that contravenes fair procedures having regard to the caselaw?
3. If so, what is the consequence of such defect and, in particular, should such defect result in the Applicants being successful in their application for injunctive relief?

17. In relation to the matter at 1. above, the issue is whether the FPN complies with the statutory requirements in relation to it as provided for in primary and secondary legislation? In relation to the former, the Act of 1947 (as amended) requires that the notice in writing state (i) that the person is alleged to have committed “that offence” which must be taken to mean that the person is alleged to have committed “an offence consisting of a contravention of a fixed penalty provision” and (ii) particulars of that alleged offence. Furthermore, the notice in writing must be in a prescribed form (and such prescription can be found in Health Act 1947 (Fixed Payment Notice and Dwelling Event Provisions) (Covid-19) Regulations, 2021 SI No. 170 of 2021 which has a template for the form concerned set out in Schedule 2 of the Regulations. Under the heading “Alleged Offence”, the template form provides:

“It is alleged that you have committed an offence (specify offence) on (insert date) at (insert time) of (insert location)”.

18. Affidavits were sworn herein by the Applicants which exhibited the fixed term notices received by the parties. Both were in similar terms. In terms of specifying the offence, the notices state “Movement of Persons Airport/Port – Contrary to Section 31A(6)(a) and section 31A(12) of the Health Act 1947 as amended”. The date, time and location are stated and these make it clear that the offence related to the movement of persons at Dublin Airport contrary to the legislation stated. The Applicants assert that this is insufficient specificity in that the particular Regulation which it is alleged had been breached should have been stated (as was the case on the subsequent summons). In relation to the level of specificity required in a charge sheet or summons, I have been referred by the Respondents to Wood, District Court Practice and Procedure, pp. 198 – 199 and I would reference the dictum of O’Dalaigh CJ therein from *Attorney General (McDonnell) v. Higgins* [1964] IR 374:

“A complaint in its essence is a statement of facts constituting an offence. It is desirable in the case of a statutory offence that it should conclude: ‘contrary to the statute in such case made and provided’; or, better still, contrary to a specific statute and section, but I can find nothing in authority or in principle that requires that a complaint in respect of contravention of a statute will be

invalid if it fails to conclude with the words, 'contrary to the statute in such case made and provided'.

However, in the present case, the primary legislation provides that the prescribed form for the FPN is to state that the person is alleged to have committed "*that offence*" being "*an offence consisting of a contravention of a fixed penalty provision*". The general legislative provision for the prescription of fixed penalty provisions is section 31A(6C) of the 1947 Act:

"(6C)(a) The Minister may make regulations prescribing such one or more penal provisions as are specified in the regulations to be fixed penalty provisions."

This general provision was not referenced at all in the FPN. Additionally, it is my view that the wording of the legislation requires that the particular offence allegedly committed be specified. The decision to issue a FPN is not done in the abstract. It is based upon a member of An Garda Síochána having reasonable grounds for believing that an offence consisting of a contravention of a fixed penalty provision has been committed. Therefore, consideration must have been given and a determination must have been made, relative to a particular offence. It is "that" offence which the legislation provides must be stated in the FPN.

In Relation to Point 2 Above

19. The Applicants contend that the lack of specificity in the FPN is such as offends the requirements of fair procedures and, in consequence, the injunctive relief being sought herein should be granted. The Respondents refute this and contend that the specificity is entirely adequate in the circumstances, the FPN not being a summons or charge sheet upon which criminal jurisdiction is being asserted. Dunne, D., '*Judicial Review of Criminal Proceedings*' (2d Ed, Round Hall, 2021) states:

"1-171 In a wider sense, abuse of process embraces all forms of conduct or behaviour on the part of the State and its agents towards its citizens that is illegal, improper, oppressive, unfair, or unjust to the extent that it would be an affront to the integrity of the administration of justice for the courts to permit the State to pursue or continue the behaviour or conduct in question to its

conclusion or to permit the State to derive a benefit or advantage from the behaviour or conduct by way of court proceedings.”

Orders prohibiting the continuance of criminal proceedings were considered in **Higgins v. DPP** [2010] IESC 46 where O’Donnell J. (as he then was) stated:

“there may have been unthinking adherence to a standard procedure, a lack of communication and general clumsiness, but that in my judgment falls far short of rendering a trial on the s.4 charge so deficient in justice that it should be prohibited as an abuse of process.”

It is my view that this dictum resonates with the circumstances arising herein.

20. I have considered the authorities relied upon by the Applicants and I am of the view that they are distinguishable from the present case. The case of **G.E. v Governor of Cloverhill Prison** [2011] IESC concerned a detention warrant with the consequence of a loss of liberty. **The State (M) v. O’Brien** [1972] IR 169 concerned a particular statutory provision which required a District Judge to form an opinion that evidence given constituted prima facie evidence that a person had committed a particular offence in order to justify a transfer to a particular place of detention in the context of an unfitness to plead if the trial proceeded. The decision of Charleton J. in **DPP (O’Brien) v. O’Sullivan** [2008] IEHC 375 is instructive in relation to the degree of specificity and detail required in an FPN. The learned Judge stated:

“The law requires that the form should be substantially the same as the precedent set out in the regulations. This indicates that the Minister framing the subsidiary legislation considered that should any issue arise, the court should look to the substance of what the accused was being warned about, rather than making a charge depend upon a perfection in form which is rarely present in human affairs. Minor errors of this kind are of no effect unless they can be shown to have confused the accused. The purpose of a criminal prosecution is to try a wrong against society. If there is a substantial misleading of the accused so that for instance, he comes to court expecting to meet a charge different to that on the summons, consideration should be given to an application to strike out the charge.”

This is not the position here. The substance of what the Applicants were being notified was clear. Read with the information which the Applicants had as deposed to in their affidavits herein, they were not substantially misled. In addition, they were not being brought to court expecting to meet a different charge, they were being afforded an opportunity to avoid prosecution and conviction entirely against a factual background of which they were well aware from the terms of the FPN and their own knowledge. I adopt the submission of the Respondents at paragraph 29 of their submissions herein:

“As a matter of common sense such notices merely have to ‘notify’, not to establish criminal jurisdiction or the elements of an offence not yet preferred. Should a prosecution come to pass (wherein guilt has to be proven forensically, to the highest standards), only then will the body of case law concerning particularisation of charge have prima facie application.”

21. Importantly, I was referred by the Respondent herein to the judgment of Barr J. in **DPP v. Kinnane** [2023] IEHC 426 which involved a charge sheet arising in the context of the statutory provisions under consideration herein. The information given in the charge sheet was no more specific than that in the fixed penalty notice herein, in particular there was reference therein to regulations made under the Act of 1947 as amended but the particular regulation in question was not detailed therein. Barr J. ruled that the degree of particularity was deficient:

‘42. Turning to the application of the relevant legal principles to the facts in this case, I am satisfied that the charge sheet in this case, is deficient in the level of detail which was furnished to the accused. The document alleged that on a particular state date, at a particular stated place, the accused has contravened a penal provision of a regulation made under s.31A(6) and 12 of the Health Act 1947, as amended. Thus, it was clearly alleged that he had breached a penal provision of a regulation made under s.31A(6) of the 1947 Act. By omitting to give any indication of what specific regulation the accused was alleged to have breached and by omitting to give any description of the behaviour on the part of the accused, that was alleged to have constituted a breach of the regulation, the complaint was defective. Accordingly, I would answer the first question raised by the learned District Court judge in the affirmative.’

but that this did not make the charge sheet a nullity but rather it remained open to amendment:

“44. I do not accept the argument on behalf of the accused that the charge sheet in this case is so defective as to be a nullity and is therefore beyond correction by amendment. While the charge sheet was defective, because it did not specify the specific regulation that was allegedly breached by the accused, nor did it give a brief description of the alleged offending behaviour on his part¹, that did not render the charge sheet a nullity. It alleged that on the date and place specified, he had breached a penal regulation that was extant at the date of the alleged offence.”

These are very different circumstances to the present which relates to a person being given an opportunity to take a course of action (namely to pay a fine with no finding of criminality attaching) in circumstances in which, if he opts not to do so, he will have a full opportunity at trial to contest his guilt. It would be extraordinary if a summons with less specificity than the FPN herein could, albeit with amendment, form the basis of a conviction but a FPN in similar terms could be used to ground an application to prevent a prosecution from proceeding.

22. It is my view and determination that there is a fundamental difference between a document initiating a criminal prosecution and a fixed penalty notice. Ferriter J. at paragraph 58 in *Cully v. The Minister for Transport, Tourism and Sport and Others* noted (at the end of paragraph)

“Article 38.1 rights are not engaged in relation to section 37 in light of those factors. If a motorist alleged to have committed a fixed charge notice offence wishes to contest that allegation, he or she can, following formal charge by way of summons, avail of a trial in court with a full panoply of rights, including a presumption of innocence, a standard of proof of beyond reasonable doubt and evidence being heard and tested on oath according to the rules of evidence.”

¹ The FPN in the present case arguably contained such brief description.

The difference cannot be ignored in the context of fair procedures. One affords means of avoiding the risk of prosecution and conviction, the other initiates a process in which such risks are inherent.

The role of the District Court

23. In the context of the argument that the arguments currently being made were more properly ones for the District Court (number 3. above), as the Respondents contended, it was argued on behalf of the Respondents that once the discretion to use the FPN procedure was used, the consequences became the same as those applicable to mandatory notices i.e. defects in the notice could be addressed before the District Court and, depending upon the relevant threshold of seriousness being reached, such defects could be invoked by way of defence. This was challenged by the Applicants herein who argued that, when discretionary, the FPN and the criminal prosecution were two separate processes and the correctness of the former is not a required proof in the latter. The Applicants posited the question as to whether, if the District Court convicted a Defendant notwithstanding such defects, would certiorari or an appeal be available on the basis that a requisite proof had been overlooked and submitted that this should be answered in the negative.

24. The manner in which defects in the FPN process should be addressed has been comprehensively considered in a number of cases in this jurisdiction albeit mainly in the context of an alleged failure to serve such notice in the context of a legislative mandate so to do. In *Kinsella v. DPP* [2018] IEHC 474, the accused had asserted before the District Court that no FPN had been received by him and, accepting that the burden of so proving rested on him, sought to adduce evidence pertaining to the determination of this matter which assertion was rejected by the District Court on the basis that this was an administrative matter only and not a matter which concerned the District Court in the context of the prosecution of the offence alleged. Dermott J. confirmed that the error alleged to have arisen in respect of the FPN was a pertinent matter in the prosecution of the offence alleged. McDermott J. outlined the rationale behind such notices:

“17. The purposes 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] 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.”

25. As to the impact of such regime upon the trial of the charges concerned, he stated:

“18. 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 circumstance, 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.”

26. Of course, the position is somewhat different in the present circumstances as, as previously indicated, the invocation of the FPN process is discretionary and there are, furthermore, no statutory presumptions contained within the relevant legislation. However, it appears to me to be clear that the fact that the charges are being proffered with the background environment of a fixed penalty process remains relevant and undeniable. Referring to the fact that a prosecution could not have been initiated during the course of the prescribed period, McDermott J. referenced the dicta of White J. in ***DPP v. Kevin Tully*** [2009] 7 JIC 1301 –

“There always remains vested in the Court, the discretion not to proceed to conviction if basic unfairness arises.”

McDermott J. continued:

“19. I am also satisfied that the basic “unfairness” referred to includes any unfairness that arises from the initiation of a prosecution in respect of failure to pay a fixed penalty notice in respect of which the accused claims not to have received the notice in circumstances which were outside his control such as the vandalism of his post box. 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 summons.”

Later in the judgment, the learned Judge continued:

“21, At the trial, the trial judge must permit the accused to raise these issues by way of defence and cross examination and adduce evidence as is relevant to them. The failure to permit the accused to address these issues and their dismissal as irrelevant administrative matters deprived his solicitor of the opportunity to defend him to the fullest extent. It may be that in many cases, the issue will be more relevant to the penalty to be imposed than provide a

successful defence to the charges but in that respect each case depends on its own circumstances.”

27. In the present case, the usage of the FPN being discretionary, the statute does not reference the entitlement to raise the issue of non-service but, once the discretion has been invoked, the 1947 Act and the Regulation both clearly contemplate the payment in accordance with the terms thereof as being a matter which may be raised before the court at the trial. In this regard, I would refer to Section 31C(3) of the 1947 Act and Schedule 2 of S.I. No. 170/2021 being the form prescribed for the purposes of sections 31A(6C)(c) and 31C(1) of the 1947 Act. I am, thus, of the view that, clearly, prosecution within the timeframe permitted for payment of the fixed penalty is a matter which the accused might properly raise before the District Court whether the invocation of the FPN process is mandatory or discretionary. However, are alleged defects in the contents of the notice matters which might also be so raised?

28. The judgment of Ni Raifeartaigh J. in ***O’Byrne v DPP and Others and Neville v. DPP and Others*** [2019] IEHC 715 is instructive in this regard. The facts of the case involved non receipt of the notice in the context of a mandatory, statutory regime. However, the *dicta* in relation to the relationship between a fixed penalty notice and “the ingredients of the offence” are most pertinent in the present context. Ni Raifeartaigh J. opined that “*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.*” However, she proceeded to clearly and comprehensively demonstrate that matters which are not ingredients of an offence may nevertheless be relevant in the context of a prosecution in respect of such offence being matters which are a “*pre-condition to prosecution*”. (paragraph 29). Ni Raifeartaigh J. concluded in this regard:

“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 approach 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.”

29. I am of the view that references to service of a FPN must relate to a FPN which is compliant with the statutory provisions pertaining to it and any issue of non-compliance is a matter which may be raised before the District Court at trial as being a precondition to prosecution.

30. As to the consequence before the District Court if the precondition is found not to have been complied with, that is not a matter for me at this time. There is clearly a difference of judicial opinion in this regard. Ni Raifeartaigh J. was of the view that failure to comply with such precondition must result in an acquittal –

“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 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 dismissal of the prosecution. I pause again to emphasize 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 decision in Kinsella and Brown discussed in the next section of this judgment.”

31. In this regard, she disagreed with **Kinsella v. DPP** [2018] IEHC 474, referenced previously herein, and **DPP v Browne** [2018] IEHC 471 (Burns J.) which supported a

wider discretion on the part of the District Judge as to result or impact. However, it is not necessary for me to determine this in the context of this case.

CONCLUSION

32. I have concluded herein that the FPN given to the Applicants herein did not comply with the statutory requirements applicable to such notice. It is my view that the requirement that the alleged offence be specified cannot be said to have been fulfilled by referring to certain sections of primary legislation (indeed, excluding some relevant and applicable provisions) in circumstances in which regulations made under that legislation provided for numerous offences, with complex detail as to their constituent elements.
33. However, it is my view that there is a very substantive difference between a FPN and a summons or charge sheet by which criminal proceedings are initiated. It is clear that a summons issued with the very same details as this FPN would not be a nullity although containing deficiencies of particularity. This shortcomings could be addressed by amendment before the District Court. The contention of the Applicants herein would result in a deficiency such as occurred here being remediable if occurring in a summons but irremediable and resulting in the failure of the prosecution if occurring in an FPN. It is my view that the standards required in the context of fair procedures are different in these two circumstances and that there is not a legal frailty arising from the deficiencies in the FPN which results in required standards of fair procedures in this context not being achieved.
34. In any event, it is my finding that once a Member of An Garda Siochana decided to invoke the FPN process, this became a precondition to prosecution and consequently adverse/deficient circumstances surrounding it (including inadequacies in the notice itself, prosecution within the period allowed for payment or prosecution following payment) once raised at the trial are matters for the District Court to address.
35. I therefore refuse the relief sought and I vacate the extant injunctions in relation to the continuation of the prosecution herein.

36. I will list this matter on the 1st February 2024 at 11 am to address any consequential matters arising.