[2025] IEHC 45

Record no. 2021/1327 P

THE HIGH COURT

Between

TRACEY O'MAHONY

Plaintiff

and

MINISTER FOR HEALTH, IRELAND AND THE ATTORNEY GENERAL

Defendants

Judgment of Ms Justice Nessa Cahill delivered on 31st January 2025

Overview

1. This Judgment addresses the relatively net question of whether a challenge to an enabling provision of an Act of the Oireachtas is moot, and should not be permitted to proceed, in circumstances where the provision itself and the regulations (the introduction of which it enabled) are no longer in effect.

2. This question arises in the context of the Plaintiff's challenge to the constitutionality of section 31A of the Health Act 1947 (as inserted by section 10 of the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020) ("*Section 31A*"). While the proceedings as issued included a challenge to the regulations enabled by, and made pursuant to, Section 31A ("*the Regulations*") (and an allegation of abuse of process was made by the Defendants in answer to that challenge) the Plaintiff confirmed in written and oral submissions that the attack on the

Regulations is not being pursued. The challenge of an abuse of process is accordingly also excised from this Motion.

3. Consequently, this Judgment addresses whether the challenge to Section 31A is moot and whether the Proceedings should be dismissed on this basis.

4. The Defendants' position is that the Proceedings are clearly moot, as Section 31A and the Regulations are no longer in effect and there is no permissible basis for these Proceedings to proceed. By this Motion, the Defendants seek an order dismissing the claim on the ground of mootness.

5. The Plaintiff's position on the Motion is that the proceedings challenge the "*the entire legislative conception*" that underlies Section 31A. Specific emphasis is placed on the arrogation of powers to the Minister for Health ("*the Minister*") (rather than the Oireachtas) to make, revoke or amend primary laws, create criminal offences, regulate the Plaintiff's rights, among other powers. It is said that presumptions of constitutionality do not properly arise and that there can be no question of constitutional interpretations of such a legislative provision. The Plaintiff's position is that the issue is not moot, and, in the alternative, that the case should proceed on the basis that the issues challenged are "*capable of repetition, yet evading review*" (applying the *dicta* of Hardiman J. in *Goold v Collins* [2004] IESC 38, [2005] 1 ILRM 1 ("*Goold*")) and are issues of exceptional public importance, among other reasons.

6. As explained in this Judgment, I find that the proceedings are moot; that it cannot be said that Section 31A has evaded or would evade review; and that there are no other circumstances which warrant this action proceeding. The Proceedings are therefore dismissed.

Section 31A

7. Section 31A was introduced into law on 20 March 2020 in the context of the Covid pandemic. It confers extensive powers on the Minister to make regulations to prevent, limit, minimise or slow the spread of Covid.

8. According to Section 31A(1),

"*The Minister may, having regard to the immediate, exceptional and manifest risk posed to human life and public health by the spread of Covid-19 and to the matters specified in subsection (2), make regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19 (including the spread outside the State) or where otherwise necessary, to deal with public health risks arising from the spread of Covid-19…*"

9. There is then an extensive list of regulations that may be made (without prejudice to the general power conferred by the section). This list includes regulations with potentially far-reaching and invasive effects on individuals and on society as a whole. It includes the possibility of regulations restricting travel and movement, requiring people to remain in certain locations, prohibiting certain events and classes of events, and requiring safeguards to be put in place by owners or occupiers of premises or classes of premises or places or classes of places "*to prevent, limit, minimise or slow the risk of persons attending at such place or class of place of being infected with Covid-19*". The Minister is also given a more general power to introduce "*any other measures that the Minister considers necessary in order to prevent, limit, minimise or slow the spread of Covid-19*" (Section 31A(1)(i)).

10. The parties agree that more than 100 regulations (the Plaintiff refers to the introduction of 138 regulations) were passed by the Minister during the currency of the pandemic, pursuant to the power conferred by Section 31A, and that none of these Regulations remain in effect.

11. Section 31A itself ceased to be operative on 31 March 2022, pursuant to a so-called '*sunset clause'* (Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020, section 2(3)(b), as amended by successive amendments which extended the expiry date of the provision from 9 November 2020, to 9 June 2021, to 9 November 2021, to 9 February 2022 and finally to 21 March 2022).

The Proceedings

12. By Plenary Summons dated 2 March 2021, the Plaintiff issued these proceedings seeking to challenge the constitutionality of Section 31A and the Regulations.

13. The Plaintiff seeks five declarations of repugnancy of Section 31A to Article 15.2.1 of the Constitution by reason of the purported conferral on the Minister alone of the following powers:

    (a) "Omnibus" sole law-making powers;

    (b) The power to amend primary legislation without temporal restraint or limit;

    (c) The power to enact criminal offences and penalties;

    (d) The power to regulate or suspend rights guaranteed to the Plaintiff by the Constitution;

    (e) The power to effect or make legislation unrestricted by, or without regard to, principles and policies.

14. The Plaintiff also seeks an order setting aside, disapplying, annulling or otherwise rendering void secondary law or measures brought into effect under section 31A. This prayer for relief is not being pursued by the Plaintiff.

15. The only orders now sought in the Proceedings are the five declarations of repugnancy summarised above.

16. By the Statement of Claim delivered on 23 April 2021, the Plaintiff pleads the unconstitutionality of the conferral of powers on the Minister by Section 31A. It is also pleaded that the Regulations introduced under section 31A have effected "*wholesale abolition of rights*" and have "*greatly injured*" her and threaten to do so further unless annulled and rendered void. The injury pleaded includes that she is "*under house arrest*" and has been denied several freedoms and rights, such as the right to freedom of assembly and the right to travel to other EU Member States for services, save on special licence or permit. The schedule to the Statement of Claim lists 71 Regulations that had then been introduced under Section 31A. It is common case that more than 100 regulations were ultimately made under Section 31A (as mentioned above, the Plaintiff refers to the introduction of 138 regulations).

17. There is no claim for damages in the Plenary Summons or Statement of Claim.

18. By way of Replies to Particulars delivered on 23 August 2021, the Plaintiff confirms that she is not seeking damages. She does claim that the Regulations had an "*actual or anticipated adverse effect"* on her and she specifically pleads that she "*is not able to leave her home without lawful excuse*" and that "*it is a criminal offence… to associate with family and friends in her dwelling*."

19. By the Defence delivered on 1 November 2021, the Defendants deny the Plaintiff's entitlement to any relief. The Defendants plead that all claims related to the Regulations and the injuries alleged to have been suffered by reason of the Regulations, are moot and ought to be struck out by reason of the Regulations no longer being in effect and/or having expired. No admission is made as to the Plaintiff's *locus standi*. It is also pleaded, without prejudice to the other pleas advanced, that any interference with the Plaintiff's rights was lawful and proportionate and that Section 31A was enacted in the legitimate discharge of the State's constitutional functions and to protect public health, the rights of citizens, the common good and the health services from the risks posed by Covid.

20. By the Reply delivered on 27 July 2022, the Plaintiff pleads (without prejudice to the other grounds of challenge) that the measures introduced "*unnecessarily or disproportionately infringed*" various constitutional protections including by arrogating to the Minister the power to enact legislation and criminal offences, without the constraint of principles and policies.

21. According to the grounding affidavit of Ms. Claire Gordon, the Plaintiff served a notice of trial on 27 July 2023, in which she estimated the trial would take 4 days.

22. By an Amended Defence delivered on 11 December 2023, the Defendants inserted a pleading to the effect that it was an abuse of process for the Plaintiffs to seek the relief sought without bringing an application for judicial review in respect of the Regulations.

23. By way of Reply to the Amended Defence delivered on 12 December 2023, the Plaintiff pleads that the "*voiding effect*" for the Regulations arises from the repugnancy of Section 31A to the Constitution.

The Motion

24. On 25 January 2024, the Defendants issued the present Motion seeking an order dismissing the Proceedings on the ground they are moot.

25. This Motion is grounded on the affidavit of Ms Gordon in which it is averred that there is no live controversy between the parties and no real issues with regard to the Regulations which the Plaintiff has a live interest in the resolution of.

26. It is asserted that the challenge to the enabling provision in Section 31A is in effect a request for an advisory opinion and not a request for a decision on a live controversy. There is also an averment made about the need to consider the allocation of scarce judicial resources. It is estimated by the Defendants that the matter is likely to require 6 to 8 days at trial (rather than 4 days as estimated by the Plaintiff).

27. The Plaintiff swore a replying affidavit on 8 April 2024, in which she disputes that the proceedings are in fact moot. She then makes several points which are aimed at demonstrating that, even if there is no live issue remaining, the issues raised are "*exceptional*" and raise issues of general public importance which require to be adjudicated, "*notwithstanding any temporary or evanescent or short-term protested mootness.*" The Plaintiff also asserts that there is a likelihood of Section 31A being re-introduced in the future; that this Motion is an attempt to ensure an amnesty; and that the Proceedings should not be halted on this basis.

The Issues raised by this Motion

28. Against the above background, the substantive topics raised by this Motion are the following:

    (a) First, the relevant principles governing the doctrine of mootness;

    (b) Second, whether these Proceedings are moot;

    (c) Third, if moot, whether there is a good basis to nonetheless allow the matter to proceed as a matter of exceptional and general public importance;

(d) Fourth, whether the case raises an illegality which is capable of repetition but will inevitably evade review, such as to justify the case proceeding;

(e) Fifth, other authorities relied upon by the Plaintiff.

The Doctrine of Mootness: Relevant Principles

29. According to the mootness doctrine, a Court should not give an opinion on a question of law unless there is a concrete factual dispute that requires and contextualises the question the Court is asked to answer.

30. As Murray CJ stated in *Irwin v. Deasy* [2010] IESC 35 ("*Irwin*"):

> *"The mootness doctrine is applied by the courts to restrain parties from seeking advisory opinions on abstract, hypothetical or academic questions of the law by requiring the existence of a live controversy between the parties to the case in order for the issue to be justiciable."*

31. Murray CJ further confirmed that, "*The general practice of this Court is to decline, in principle, to decide moot cases*."

32. It is only in exceptional and tightly circumscribed situations that there may be any discretion to allow a moot case to proceed and, even then, that discretion can only be exercised sparingly (*per* Clarke J. in *PV v. Courts Service* [2009] 4 IR 264), with caution (*per* Murray C.J. in *Irwin*) and should be based on an assessment of certain relevant factors.

33. The circumscribed nature of the Court's discretion to proceed to hear a moot case was emphasised by McKechnie J. in *Lofinmakin v Minister for Justice, Equality and Law Reform and Others* [2013] 4 IR 274 (at ¶51). According to McKechnie J. (echoing the statement of Murray CJ. in *Irwin*), this discretion should only be exercised "*reluctantly even where there is an important point of law involved*." Indeed, according to Denham C.J. in the same case, "*the foundations of a case that is moot have fallen away and so they are usually not appropriate cases upon which to decide important points of law, unless there are other factors*…" (¶22).

34. The fact that an important point of law is raised is not a basis to resist the application of the mootness doctrine. On the contrary, the mootness doctrine necessarily applies with particular vigour to challenges to the constitutionality of legislation and heightens the caution that must be exercised in deciding whether to allow a moot case to proceed. In *P.V. v. Courts Service*, Clarke J. made this point:

> "*a court is not obliged to determine matters which raise merely hypothetical or abstract questions. The Supreme Court in McDaid v. Judge Sheehy [1991] 1 I.R. 1 has emphasised that the courts should refrain from unnecessary adjudication. That this will especially be the case when the constitutionality of a statute is impugned is clear from Murphy v. Roche [1987] I.R. 106.*" (at ¶14).

35. *Goold* is also relied upon by the Defendants in this respect. There, Hardiman J., delivering the judgment of the Supreme Court (Geoghegan and Fennelly JJ. concurring) noted:

> "*Mootness and the discretion of the Court which is triggered by a point being moot is of particular relevance when the point on which a decision is sought involves the constitutionality of a statutory provision*" (page 21).

36. Hardiman J. quoted the following passage from the judgment of Fennelly J. in *White v. Dublin City Council* [2004] 1 IR 545 (¶35) with approval:

> *"It is well-established in the case law of this Court that a challenge to the constitutionality of a statute will not normally be addressed until the person mounting the challenge shows that he is affected by the provision. Finlay C.J. stated that it is clear from the jurisprudence that the Courts should not engage in the question of the possible invalidity of an Act of the Oireachtas unless it is necessary for its decision to do so." (McDaid v Sheehy [1991] I.R. 1 at page 17.) Where there are points which do not entail such a question, it follows that they must be dealt with first. If they are decided against the party raising the constitutional question, the latter will not normally be reached."*

37. While *White* concerned the slightly different question of the sequence in which constitutional and non-constitutional issues in a case should be determined, it underscores the importance of not assessing the constitutional validity of legislation

unless there is a live and present need to do so. The reliance placed on this authority by the Supreme Court when applying the mootness doctrine in *Goold* confirms that there is a common and overarching objective of ensuring the Courts do not unnecessarily, in the absence of a live, factual contest, pronounce on constitutional questions.

38. The rule requiring a litigant to have *locus standi* to bring a constitutional challenge is another such manifestation of the general and fundamental requirement that such challenges should not be brought in a factual vacuum, on the basis of hypotheses, but only when necessary to determine and impact on the rights or liabilities of a litigant.

39. In *Morrissey v. NAMA* [2019] IEHC 576 Ni Raifeartaigh J. summarised this principle:

> "*The Court should not proceed to decide constitutional issues in the absence of a concrete factual situation in which a consideration of the constitutional issues is necessary and appropriate. This is a well-established proposition of constitutional law*" (at ¶144).

40. The danger that must be guarded against in this respect is that a court could otherwise be drawn into giving "*gratuitous advice on legal issues to the Oireachtas and the Government, a function which was never conferred on it by the Constitution*" (*Salaja v. Minister for Justice, Equality and Law Reform* [2011] IEHC 51, ¶7 *per* Hogan J, as approved by McKechnie J in *Lofinmakin* at ¶61).

41. The imperative that constitutional challenges must be rooted in live facts necessarily informs the correct approach to take to this Motion and the rigour with which any alleged exceptions to the mootness doctrine should be applied.

Whether the Proceedings are Moot

42. This question requires an assessment of whether there is a real, live, existing dispute between the parties and whether a judicial determination would have a practical effect on the resolution of that dispute and on the rights of the parties.

43. The Defendants emphasise a number of undoubtedly important factors, including that the pandemic itself is over; the entire legislative apparatus that was in place to deal with the pandemic (including Section 31A) is gone and no longer in effect; there is no

criminal prosecution against the Plaintiff; no claim for damages is made; and the Plaintiff accepts that the case is moot insofar as it concerns the Regulations.

44. The Defendants point to the need for there to be defined issues in a concrete legal and factual setting and contend that this case is clearly moot. It is also said to be incomprehensible how the Plaintiff can concede the mootness of the challenge to the Regulations and not the challenge to Section 31A.

45. I note that there is no pleading in the Defendants' Amended Defence to the effect that the challenge to Section 31A is rendered moot by that provision no longer being in force (despite the provision having ceased to be operative on 31 March 2022 and the Amended Defence having been delivered on 11 December 2023).

46. No point has been taken in this respect by the Plaintiff and I do not propose to attach weight to the fact that this specific mootness objection with regard to Section 31A has not been pleaded by the Defendants. It is plain as a matter of law that Section 31A ceased to be operative on 31 March 2022, it is only from that date that mootness can be asserted, and I will address this Motion on this basis.

47. On this first, threshold question, the Plaintiff's position appears to be that the challenge to the Regulations is moot, but the challenge to Section 31A is not. There are three reasons advanced by the Plaintiff in her affidavit for her contention that the case is not moot (while acknowledging it is a matter of legal submission).

48. First, she avers that the fact the Regulations and Section 31A have lapsed does not render the Proceedings moot and relies on the pleaded case that her constitutional rights were infringed "*in a very large number of ways*" by the Regulations (including those matters pleaded and summarised above). She asserts that the "*abandonment*" of the measures should not create an amnesty or prevent proper adjudication of their legality.

49. Second, the Plaintiff makes the averment that the Regulations and Section 31A were in effect when the Proceedings issued and continued "*up to and beyond delivery of the Defence*" and that pleadings were "*all but closed*" when the measures were "*let lapse*". The Plaintiff asserts that the Defendants have failed to indicate or guarantee that they would not re-introduce such legislation or Regulations.

50. Third, the Plaintiff refers to the risk of further pandemics and asserts that litigation regarding the lawfulness of measures introduced may be difficult or impossible during the currency of a short pandemic. Her position is that "*there must be a distinct advantage*" to such measures being assessed outside of crisis mode.

51. These reasons all hinge on an acknowledgement that the asserted infringements have ceased and the legislation is no longer in force. What the Plaintiff is in fact saying is that the challenge should proceed because of reasons related to public policy and the risk of future recurrence of the same events. Considerations of this sort may be relevant to the question of whether a case that is moot should nonetheless be allowed to proceed to trial (and will be addressed as such in later sections of this Judgment). They do not however answer the first question of whether the proceedings are moot. On the contrary, the very fact that the Plaintiff relies on possible future events and broader policy considerations, confirms that there is not a present, live dispute to provide the factual context and basis for the challenge she wishes to bring.

52. Insofar as the Plaintiff quite correctly points out that Section 31A was in operation for a year after the issue of the Proceedings, that could be relevant to the question of costs (a point on which I express no opinion at present). It does not however alter the fact that the provision is not now in force and the Proceedings are now moot. The possibility that mootness may arise during the currency of Proceedings was confirmed in *Borowski v. Canada* [1989] 1 SCR 342 ("*Borowski*") in a passage adopted in *PV v. Courts Service* (at ¶16): "*Such a live controversy must be present not only when the action or proceedings is commenced but also when the court is called upon to reach a decision*." The facts of *Borowski* have some resonance here: it concerned a challenge to the validity of sections of the Canadian Criminal Code relating to abortion, a challenge which was found to be moot owing to the provisions in question (among others) having been struck down by a decision of the Canadian Supreme Court in another case.

53. I note the Plaintiff's point that, if she had breached the Regulations and was subject to an ongoing criminal prosecution, the Proceedings may not be moot. That may well be so, but it is simply not the case before me and cannot alter my findings. The case of *McGrath v DPP* [2023] IEHC 347 on which the Plaintiff relies is – as the Defendants' Senior Counsel correctly points out - sharply distinguishable. In *McGrath*, the reason Bolger J. found the constitutional challenge to legislation introduced in the context of

the Covid pandemic not to be moot, was that the continuation of a then-stayed criminal prosecution depended on the outcome of the constitutional challenge.

54. I note the Defendants' reliance on the Plaintiff's decision not to claim damages and agree that this has some relevance to this Motion, although the inclusion of a damages claim would not be sufficient to alter the findings made here.

55. The inescapable fact is that the Plaintiff cannot point to any real, live, existing dispute or claim, or any present right or liability, that would plausibly be practically impacted by a judicial determination of these Proceedings. This case is a moot one.

56. It is telling that McKechnie J. in his judgment in *Lofinnmakin* (¶65) provides a list of examples of cases in which there is no real or actual conflict and the first example given is a case in which the impugned provision has been repealed or has expired.

57. In making this finding, I wish to emphasise that there is and can be no doubt that the powers conferred by Section 31A were exceptional and unprecedented; that very extensive powers were conferred on the Minister by Section 31A; or that Regulations introduced pursuant to those powers did impose extraordinary restrictions on the personal freedoms and rights of residents of the State.

58. However, these facts and the fact that the rights of the Plaintiff (along with every resident of the State) were impacted in a severe and unprecedented manner by the legislative regime introduced in response to the pandemic, does not alter the fact that the pandemic and those impacts have long since ceased and Section 31A is no longer in force. There is simply no present, live issue as between the Plaintiff and the Defendants as regards the validity of the expired Section 31A and this case is moot.

59. However, that is not the end of the matter. There are recognised exceptions to the mootness doctrine, which are invoked by the Plaintiff here, and which I must next consider.

"Exceptional public importance"

60. The case advanced by the Plaintiff in her affidavit is that, if the case is moot, it should nonetheless proceed, as it raises questions of law of exceptional, general public importance. She addresses various aspects of the impugned legislation, including the

exceptional and unprecedented nature of the restrictions introduced by the Regulations; the number of criminal prosecutions that were brought; and the breadth of the delegation to the Minister. She asserts that there would be an amnesty conferred on the legislation, an immunity from challenge, if this case does not proceed.

61. The Defendants' position is that the narrow, rare and exceptional circumstances in which a moot case may be heard do not apply here.

62. In order to assess the parties' positions in this respect, it is necessary to consider the judgment of Murray C.J. in *Irwin* which he helpfully summarised the "*exceptional public importance*" exception to the mootness doctrine:

> *"In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance, the Court may in the interests of the due and proper administration of justice determine such a question.*
>
> *However, the discretion to hear an appeal where there is no longer a live controversy between the parties should be exercised with caution, and academic or hypothetical appeals should not be heard. Exceptions may only arise where there is a question of exceptional public importance at issue and there are special reasons in the public interest for hearing the appeal."*

63. In order to fall within the potential scope of this exception, a number of conditions have to be met:

> First, there must be "*exceptional circumstances*" and "*a point of law of exceptional public importance.*"
>
> Second, one or both parties must have a "*material interest*" in the decision.
>
> Third, the continuation of the Proceedings must be "*in the public interest*" and "*in the interests of the due and proper administration of justice.*"

64. Applying the first set of criteria here, there is and can be no dispute that the powers and restrictions introduced in the face of the Covid pandemic were exceptional,

extraordinary, unprecedented, and had a highly invasive impact on the rights and freedoms of residents of the State (among others).

65. The Long Title to the 2020 Act itself states that it is

> *"[a]n Act, to make exceptional provision, in the public interest and having regard to the manifest and grave risk to human life and public health posed by the spread of the disease known as Covid-19 and in order to mitigate, where practicable, the effect of the spread of that disease and to mitigate the adverse economic consequences resulting, or likely to result from the spread of that disease and to mitigate its impact on the administration of vital public service functions…"*

66. The recitals to the 2020 Act refer to the Covid pandemic and state,

> *"the State is and its citizens are, in significant respects, highly exposed to the effect of the spread of that disease; and having regard to the constitutional duty of the State to respect and, as far as practicable, by its laws to defend and vindicate the rights of citizens to life and to bodily integrity, it is necessary to introduce a range of extraordinary measures and safeguards to prevent, minimise, limit or reduce the risk of persons being infected with that disease";*
>
> "*the emergency that has arisen is of such a character that it is necessary for compelling reasons of public interest and for the common good that extraordinary measures should be taken to mitigate, to the extent practicable, the adverse economic consequences resulting, or likely to result, from the spread of that disease and to mitigate its impact on the administration of vital public service functions."*

67. The impugned legislation, and the circumstances in which it was enacted, were exceptional and it is almost trite to say that a challenge to the constitutionality of the powers conferred on the Minister by Section 31A would *per se* raise questions of public interest. This is not by any means a comment on the merits of the case or the defence to it, but merely an acknowledgement that the issues arising are ones of public interest and importance.

68. However, this is plainly not sufficient. If it were, cases which raise significant constitutional challenges would be presumptively exempt from the mootness doctrine, a proposition which is diametrically at odds with the principle (addressed above) that constitutional challenges should not be allowed to proceed unless there is a live factual dispute that requires their determination.

69. The second requirement is that one or both parties must have a "*material interest*" in the Proceedings. *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2007] 1 IR 328 is a good illustration of an otherwise moot case in which such an interest was found to exist. There, the Board had a real, practical interest in the outcome of the case in question, as it affected how it continued to discharge its statutory functions. It was also found that the plaintiff retained an interest in the outcome of the case as it could affect any future engagement between Mr. O'Brien and the Board. On that basis, despite the underlying facts of the specific case having changed and the case having been rendered moot, it was allowed to proceed.

70. There is no such situation here. Neither the Defendants nor the Plaintiff has any real interest in the outcome of this case. The Plaintiff may wish to obtain an advisory opinion as to the constitutionality of legislation that is no longer in effect, but that cannot and does not constitute a "*material interest*" such as to overcome the mootness doctrine. There is simply no basis for the Plaintiff to assert a relevant, material interest to justify this case proceeding.

71. Moreover, the question of whether it is "*in the public interest*" or "*in the interest of the proper and due administration of justice*" for this case to proceed can only be answered firmly in the negative. There are several reasons why this is so, but one particularly important – and unanswerable - point is that the constitutionality of Section 31A has already been heard and determined by Nolan J. in *Ring v. Minister for Health* [2024] IEHC 323 ("*Ring*").

72. In *Ring*, the plaintiffs had been charged with offences under Section 31A(6) and Section 31A(12), arising from alleged breaches of regulations made pursuant to Section 31A. The plaintiffs had a direct, material interest in the proceedings and the question of mootness did not therefore arise.

73. One of the claims made by the plaintiffs in that case, and rejected in the judgment of Nolan J., was the claim that Section 31A is repugnant to Article 15.2.1 of the Constitution. There closely resembles and overlaps with the claim the Plaintiff seeks to advance in these Proceedings. In *Ring*, the Court determined that "*the principles and policies are manifest. They could not be clearer*" (¶55) and, on several grounds, that "*the safeguards which are contained in the legislation were appropriate*" (¶72). Nolan J. concluded that Section 31A and the regulations made thereunder were constitutional.

74. The challenge which the Plaintiff seeks to advance has therefore been substantively determined by the High Court in *Ring*. I can conceive of no basis – and none is advanced by the Plaintiff – on which it can be said that the determination of the same (or a substantially similar) constitutional challenge could be in the public interest or in the interests of the proper administration of justice. Rather, there are strong considerations of public policy for not allowing this case to proceed.

75. In making these findings, I am particularly mindful of the rationale for the mootness doctrine, a layer of analysis which was mandated by the Canadian Supreme Court in *Borowksi* and adopted by Hardiman J. in *Goold*. McKechnie J. in *Lofinmakin* (at ¶83) similarly emphasised that any decision as to how to exercise the discretion to disapply the mootness doctrine, "*should reflect the basic purpose of the rule and should be concordant with its underlying rationale.*"

76. As addressed in *Borowski*, the rationale for the doctrine that has three elements: first, it is fundamental to an adversarial system of justice that both parties have a full stake in the outcome of the proceedings. The absence of any material interest of either party in these Proceedings has already been addressed.

77. Second, considerations of judicial economy require an assessment of whether it is worthwhile to allocate valuable and scarce judicial resources to hear and determine a moot case.

78. The Plaintiff disputes the relevance of the impact on judicial resources, contending that, even if the matter does take 6 to 8 days (as the Defendants suggest in the grounding affidavit of Ms Gannon), this is not an excessive use of judicial resources "*having regard to the public issues raised*". In making this submission, the Plaintiff overlooks the fact that the hearing is only one aspect of the judicial and court resources that would

fall to be expended. She also fails to consider other litigants' right of access to the Courts for the determination of live disputes with a concrete impact on their rights and liabilities. There is also no consideration of the fact that judicial resources have already been expended in determining substantially the same challenge in *Ring*.

79. Third, courts must consider the effectiveness or efficiency of judicial intervention. Given the analysis set out above, it is apparent that no practically useful purpose would be served by a decision in this case. Judicial intervention would not be effective, efficient or worthwhile and the rationale for the mootness doctrine therefore points firmly against this case proceeding.

80. In summary, each of the purposes of the mootness doctrine militates unequivocally against this case proceeding.

81. The final issue to address is the specific exception invoked by the Plaintiff that it is "*likely*" that there will be another pandemic and Section 31A will be re-introduced, and, if this case does not proceed, there will be an effective amnesty to prevent judicial scrutiny of that provision. The Plaintiff's position is that the impugned provision will be repeated and evade review.

Capable of repetition, yet evading review

82. It is established that, where an issue, by its nature, cannot be challenged while live, and yet is reasonably expected to recur, it may be held to fall outside the mootness doctrine. In *Goold*, Hardiman J. addressed this test of whether an issue is "*capable of repetition yet evading review*":

> "*In the United States, an issue is not deemed moot if it is 'capable of repetition, yet evading review' a phrase devised in 1911 and constantly used thereafter, e.g. in Honig v. Doe 484 US 305 [1988]. This is said to be the case where '(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again'. (See generally, Tribe op cit. page 349).*"

83. Hardiman J. continued,

"*As might be expected from that formulation, such cases have tended to focus on time limited events such as election campaigns, pregnancy, (as in Roe v. Wade) and time limited court orders especially in the domestic violence area*."

84. *Goold* concerned an attempt to challenge a protection order which had been made against the applicant, and the constitutionality of the underlying legislation, despite the protection order having been discharged by the agreement of the relevant parties. Hardiman J. determined there was "*no reasonable expectation that the applicant/respondent will again be subject to the same action…*" (page 29) and "*simply no evidential foundation for such an expectation*". The case was moot and was not allowed to proceed.

85. In seeking to lay the necessary evidential foundation to come within this carve-out from the doctrine of mootness, the Plaintiff avers that there is "*a well-nigh statistical certainty*" of another pandemic. She relies for this assertion on an alleged statement by the World Health Organisation ("*the WHO*"). She also makes the assertion on affidavit that it is "*highly likely*" that Section 31A will be invoked again in the future. The exhibit she relies on for these propositions is a press release about the Government's support for the WHO, including in relation to the development of an international pandemic treaty. The article says nothing whatsoever about the likelihood of further pandemics and does not refer to the re-introduction of Section 31A or any similar – or indeed any - legislative provision.

86. The Defendants' position in written and oral legal submissions is that there is a crucial distinction to be drawn between issues that will arise again and issues that might arise again. It is said that the chance there might be another pandemic is not enough.

87. Having weighed the evidence before me, I am not satisfied that the Plaintiff has shown a likelihood of a recurrence of the same legislative regime which she seeks here to challenge. Even if there was another pandemic, there is no basis to believe it likely that it would result in the enactment of Section 31A, or a similar provision. Previous pandemics and epidemics have not resulted in such exceptional measures.

88. In any event, a challenge to the now-expired Section 31A will not necessarily have any relevance to any legislative measure that may be introduced in the future. Any enactment could only be tested against the very specific facts, evidence and

circumstances that surround its introduction. This point was emphasised by Meenan J. in refusing to allow a challenge to Covid regulations to proceed in *Ganley v. Minister for Health* [2021] IEHC 822 (albeit by reference to then-expired regulations rather than the enabling statutory provisions and despite the fact that the pandemic was then still ongoing). Meenan J. held that,

> "…*the legality, or otherwise, of any future regulations is going to depend on whether the restrictions imposed are proportionate to the danger being faced. Finding that the now rescinded restrictions were disproportionate would be of little value in considering the legality of similar restrictions that could be introduced in the future to deal with a different threat*" (¶19).

89. The point is also made by the Defendants' Senior Counsel – with considerable force and merit - that the facts do not support the contention that judicial oversight of legislation would be evaded if there was another pandemic. Such a contention is simply not supported by the experience of litigation surrounding Covid, there having been several cases in which legislative responses to the pandemic were the subject of judicial determinations. The judgment of Nolan J. in *Ring* is particularly important here and thoroughly undermines the Plaintiff's contention that Section 31A has evaded or would evade review.

90. This contention is also weakened by the fact that the Plaintiff did not prosecute these Proceedings as expeditiously as she could have. For example, the Plaintiff took from 1 November 2021 until 27 July 2022 to deliver a Reply and did not take any step after that until she attempted to set the matter down for trial on 27 July 2023, over two years after the issue of the Proceedings.

91. I do not believe there is any plausible basis for the assertion that Section 31A was inherently incapable of review. Quite apart from the fact that a constitutional challenge to that provision was in fact heard and determined in *Ring*, if these Proceedings had been prosecuted in a more timely fashion by the Plaintiff, the Plaintiff's own challenge could conceivably have been heard and determined before 31 March 2022, when Section 31A was still in force.

92. A related – and not unreasonable – point made by the Defendants is that, if there is another pandemic, and more legislation akin to Section 31A and the Regulations is introduced to deal with that scenario, the Plaintiff can then challenge that legislation.

93. Having considered the evidence and submissions presented by both sides, I do not see a sufficient evidential or factual basis to reasonably expect that Section 31A will be re-introduced. It is also impossible to conclude that Section 31A has evaded or is inherently apt to evade review if it was re-introduced in the future. Legal proceedings challenging aspects of the legislative response to Covid (including the constitutionality of Section 31A) were heard and determined and this case could have been among them if it had been prosecuted more expeditiously. There is no good reason to form the view that such challenges could not be brought in the event that another such legal regime was introduced in the future in response to another pandemic.

94. In short, the carve-out from the mootness doctrine to allow challenges to events which were "*capable of repetition yet evading review*" does not apply here.

Other authorities

95. There are two authorities which counsel for the Plaintiff relied upon in written and oral submissions, namely *Buckley v. the Attorney General* [1950] IR 67 ("*the Sinn Fein Funds Case*") and *East Donegal Co-operative Livestock Mart v. the Attorney General* [1970] IR 317 ("*East Donegal Co-operative*").

96. It is not apparent to me how either of those cases are applicable or relevant to this Motion. In the *Sinn Fein Funds Case*, the judgment of Gavan Duffy P. does refer to the important principle that a court cannot abdicate its jurisdiction to deal with a case with which it is seised in deference to an Act of Oireachtas (at page 70). However, as pointed out by Senior Counsel for the Defendants, this arose in the particular context of legislation which was introduced during the currency of the Proceedings, specifically requiring the pending proceedings to be stayed. This is not analogous to these Proceedings or this Motion. Neither is *East Donegal Co-operative*.

97. In that case, the plaintiffs were directly affected by the impugned legislation which introduced a regime of licensing for their livestock mart business. They were held to have standing to bring the proceedings to protect their rights against threatened or

apprehended infringement. The material finding by Walsh J. (at page 339) was that "*the plaintiffs are engaged in the type of business which is directly affected, and subject to control, by the provisions of the Act and it is the opinion of this Court that they have, therefore, a right to maintain these proceedings*."

98. Neither of those cases is concerned with the question of mootness and they do not assist me in determining this Motion.

99. Submissions were also made on behalf of the Plaintiff regarding the presumption of constitutionality, but as pointed out by Senior Counsel for the Defendants, that is not material to this Motion. The issue raised by this Motion is not the presumed constitutionality of Section 31A but the fact that that provision is now no longer in effect. I do not, and have no need to, make any finding or comment on its constitutionality, presumed or otherwise, in deciding this Motion.

Conclusions

100. Having weighed the evidence and submissions advanced by the parties, I consider that these Proceedings are unequivocally moot and that this is not a situation in which there is an issue of exceptional public interest such that either party has a present, material interest in the case or that it is in the interests of the public or the proper and due administration of justice for the Proceedings to continue.

101. The assertion that Section 31A is likely to be re-introduced and yet evades review is not borne out by the evidence or authorities presented to me and is, on the contrary, squarely contradicted by the history of litigation surrounding that provision and other legislation introduced in response to the Covid pandemic.

102. When regard is had to the rationale for the mootness doctrine, I am of the firm view that it would not be an efficient, effective or a worthwhile use of judicial resources for this case to progress further. On the contrary, it would be an exercise in wastefulness and in disregard of the proper scope of the mootness doctrine and the requirements of judicial economy for this case to proceed.

103. A more fundamental obstacle is that there would be a real danger that a judgment on the issues raised in this case would be an advisory opinion as to the constitutionality of

legislation and could be perceived as an attempt to direct how the Oireachtas may legislate in the future, in the absence of a good reason to decide any such question in the present. This is precisely the type of hypothetical, advisory judicial intervention which the mootness doctrine aims to guard against, and highlights why that doctrine is important and should only be deviated from in tightly circumscribed and limited situations. This is not one of those situations and these Proceedings must be dismissed.

104. In light of the decision arrived at, I am of the provisional view that an order of costs should be made in favour of the Defendants. If the Plaintiff wishes to contend for a different costs' order, she may deliver written submissions to the Defendants by 5pm on 14 February 2025 and the Defendants may deliver written submissions in reply by 5pm on 28 February 2025. The written submissions should be no more than 1,500 words in length. I will then list the matter before me at 10.30am on 11 March 2025 to hear any oral submissions the parties may wish to make on the question of costs.