AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2021:000111

[2022] IESC 32

O'Donnell CJ
Irvine P
MacMenamin J
O'Malley J
Baker J
Hogan J
Murray J

Between/

GEMMA O'DOHERTY AND JOHN WATERS

APPLICANTS/APPELLANTS

AND

MINISTER FOR HEALTH, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS/RESPONDENTS

and-

DÁIL ÉIREANN, SEANAD ÉIREANN AND AN CEANN COMHAIRLE

NOTICE PARTIES

JUDGMENT of Mr. Justice Gerard Hogan delivered the 5th day of July 2022

Introduction

1. While I have the misfortune to disagree with the conclusions of the majority of the Court, I gratefully adopt the statement of facts and the outline of the principal legal

issues set out in the judgment of the Chief Justice. As we shall see, the applicants in the present case originally sought leave to apply for judicial review in the High Court. They were directed by order of Murphy J. dated 21st April 2020 to make that application for leave on notice to the respondents in accordance with Ord. 84, r. 24(1) RSC. The respondents duly filed an affidavit in opposition and were heard in opposition to the grant of leave. Leave was ultimately refused by the High Court and the Court of Appeal. By a Determination dated 23rd November 2021 the applicants were permitted to appeal to this Court against that refusal of leave in respect of three grounds in particular: see [2021] IESCDET 129. I propose presently to examine these grounds in more detail. But first it is necessary to say something more by way of introduction to this appeal.

2. The emergence of a novel coronavirus (known as SARS-CoV2) in the city of Wuhan, Hubei Province in the central region of the People's Republic of China at some stage in late December 2019 – or possibly even earlier – was to present this State (together with virtually every other country in the world) with one of the greatest public health challenges in a century. This was a highly infectious virus for which at the time there was no known medical therapy or vaccination. It produced a new pneumonia style illness known as Covid-19 which was sometimes lethal, especially in the elderly and the immuno-compromised.

3. By February 2020 the thoughts of public health agencies and Governments were directed to the extent of the threat posed by this new emerging pathogen. As Meenan J. noted in his judgment in the High Court, in late February 2020 the Lombardy region of northern Italy endured a form of medical catastrophe when its admittedly world-class medical system was nonetheless effectively overrun by the uncontrolled spread of this new infection. The medical and public health communities in this country (and

elsewhere) must have shuddered at these developments and dreaded the prospect which the imminent arrival of the virus presented. And the virus came.

4. By mid-March 2020 this State faced a full blown public health and medical emergency. There was a real risk that our own hospital and public health system would be overrun. In the event this, fortunately, did not quite happen. The Government and the Oireachtas responded to this incipient crisis with a series of legislative measures, the details of which I will shortly describe. The effect of these measures was to ensure that the majority of the population remained at home for long periods, with many features of ordinary life suspended. These restrictions continued – with different degrees of intensity – over a period of two years until the end of January 2022.

5. The nature and extent of the response of the elected and democratically elected members of the Oireachtas and Government to this crisis can be – and is – a matter of legitimate comment and debate. Some may, for example, consider that these measures were not necessary or had counter-productive effects. Others may think that the response of countries such as Sweden – which in large measure avoided large scale mandatory stay at home measures – was more appropriate. Yet others again may counter by saying that the experience of a country such as Sweden with its broadly dispersed population in a vast swathe of territory and which enjoys an advanced public health care system could not easily be replicated here. There are, of course, many others who contend that the legislative and administrative response to the crisis was, if anything, too permissive and that such was the extent and scale of the medical emergency that an even more rigorous response was required.

6. One thing is clear: this Court has neither the competence or expertise nor (just as importantly) the democratic mandate to choose between the range of possible responses to this crisis: these were matters exclusively for the Government and the Oireachtas to

consider and determine. While the appropriate nature of the response to a crisis of this kind will doubtless be the subject of much political, scientific, medical and epidemiological debate over the coming years, appropriate and due weight must be given to the judgment of those who are politically accountable to the People. Especially in the early days of the pandemic, both the Oireachtas and the Government were confronted with a novel public health emergency which was attended by much medical and scientific uncertainties.

7. Given that Article 40.3.2 of the Constitution obliges the State by its laws to protect and to vindicate "as best it may" the life and person of every citizen, the Government and the Oireachtas were under a clear constitutional duty to seek to protect the population from a potentially lethal new pathogen. The very existence of this duty was itself recognised in the Long Titles of both the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020 ("the Health Act 2020") and the Emergency Measures in the Public Interest (COVID-19) Act 2020 ("the Emergency Measures Act 2020").

8. Accordingly, so far from choosing or electing as between the range of responses (which it must again be stressed, as unelected personages, we would have no competence or democratic authority to do) our sole task as judges is to measure the legislative and administrative response to the crisis against the requirements of the Constitution itself. It is against that background that this application for leave to apply for judicial review must be considered.

The nature of the applicants' case

9. It may be noted at this juncture that it would seem that the applicants have very singular views regarding the nature of the threat posed to public health from early 2020 onwards. Thus, for example, at one point in her oral submission to this Court Ms. O'Doherty

compared the SARS-CoV 2 virus to the common cold and pronounced that the 2020 legislative measures were part of an effort to establish a new world order where citizens will be subjected to authoritarian control. At other points in their written submissions the applicants described the nature of the risk posed as merely the equivalent of that posed by the common influenza virus during the winter season.

10. While these views are doubtless sincerely held and the applicants are, of course, fully entitled to express them, speaking for myself, I can only regard it as tragic that they cannot see – or bring themselves to see – the real nature of the very serious public health threat which confronted the Government and the Oireachtas in the early months of 2020. They appear to have allowed themselves to be deluded by byzantine suspicions regarding the actions and motives of others. The blunt and unfortunate reality is that thousands died – often alone – in our hospitals and nursing homes directly as a result of Covid-19 and that for many who were so infected and who nonetheless survived, the road to recovery was debilitating, long and complicated.

11. It is all the more unfortunate that the applicants have succumbed to this way of thinking, because it has only served to obscure, obfuscate and ultimately damage a hugely important case which raises – or, at least, has the potential to raise – significant and far-reaching constitutional issues. The applicants' grounding statement of 15th April 2020 is, in fact, a sober document which sets out in some detail the history of the SARS-CoV2 from January 2020 to March 2020, together with the background to the enactment of the Health Act 2020 and the Emergency Measures Act 2020 (at paragraphs 1 to 34). The applicants then proceed to set out in great detail the relevant provisions of the Constitution. They then raise a large variety of legal objections to the validity of these measures. Much of this appears to be reproduced in broadly similar terms in their joint affidavit of 15th May 2020.

12. It is true that, in line with the earlier Determination of this Court in this matter, one may readily say that the applicants clearly lack standing to advance certain aspects of their complaints (they have not, for example, shown how they were affected by the operation of the legislative changes to the Residential Tenancies Act 2004 effected by the Emergency Measures Act 2020). One could equally observe that the applicants have sought to rely on matters which are plainly non-justiciable, such as, e.g., their reliance in places on the provisions of Article 45 of the Constitution. Other aspects of the case – e.g., arguments regarding the powers of the Taoiseach and the composition of the Oireachtas in the wake of the general election held in February 2020 – were either discontinued or were not subsequently pursued in the wake of the judgment of Irvine P. for the Divisional Court in *Bacik v. An Taoiseach* [2020] IEHC 313, [2020] 2 ILRM 110 in respect of these issues.

13. Much of the rest of the grounding statement, however, adopts the conventional style of the pleader with which all members of the Court are thoroughly familiar. Beyond, indeed, their frequent assertion in the grounding statement and affidavit that there was no "clinical" basis for any of these legislative measures, I find little enough in either their grounding statement or subsequent affidavit which is objectionable. (This is not, of course, to be understood as an endorsement of their respective contents.)

14. The difficulty, I think, which arises in this case comes from the actual manner in which the applicants have conducted the litigation. A flavour of this may be gauged from the judgment of Meenan J (at paragraph 56) in the High Court:

> "Unfortunately, in making their case for leave the applicants, who have no medical or scientific qualifications or expertise, relied upon their own unsubstantiated views, gave speeches, engaged in empty rhetoric and sought to draw an historic parallel with Nazi Germany – a parallel which is both absurd

> and offensive. Unsubstantiated opinions, speeches, empty rhetoric and a bogus historical parallel are not a substitute for facts."

15. Much the same objection is to be found in the judgment of Birmingham P in the Court of Appeal (at paragraph 32 of the judgment):

> "Both in this court and in the High Court, the applicants have made assertions in trenchant terms. I do not doubt that the views expressed are sincerely held, implausible, and indeed, eccentric, as many of them might appear to be, but the fact that individual citizens disagree with government policy and legislation enacted by the Oireachtas, does not provide a basis for a constitutional challenge. Bald assertions do not morph into anything more than that merely because the assertions are couched in strong, or indeed, extravagant language. One cannot lose sight of the fact that establishing that there is a rational basis for adopting a fundamentally different policy approach would not assist the applicants, even if they could achieve that; they must go much further than that and establish that the measures taken were impermissible and outside the range of responses available to the executive and the legislature."

16. Viewed in the round, therefore, there are essentially two aspects of the applicants' case. The first – which is largely based on their oral submissions – is directed to a challenge to the very existence of a public health emergency and generally dismissing (often, unfortunately, in intemperate and inconsiderate language) the nature of the threat which the emergence of the new SARS-CoV2 virus posed in the early months of 2020 and thereafter. The second is directed to the nature of the restrictions on constitutional rights and personal liberty effected by the Health Act 2020 and the Emergency Measures Act 2020 and the regulations thereunder.

17. I should say immediately that I agree with the judgment of the Chief Justice that no leave should be granted in respect of the first part of the case insofar as the applicants challenge the constitutionality of the Health Act 2020 and the Emergency Measures Act 2020 and the regulations made thereunder (which, for the sake of convenience, I propose to term compendiously as the "the 2020 legislative measures") on the basis that no real threat to public health was posed by the emergence of SARS-CoV2 and that no legislative response of this (or any other) kind was necessary. No scientific, epidemiological or medical evidence has been advanced by the applicants in respect of these claims and I agree with all that the Chief Justice has said on this topic.

18. The remainder of this judgment is accordingly directed exclusively to the second aspect of the applicants' case. This aspect of their case necessarily assumes the existence of a real and grave public health emergency from about March 2020 onwards. This part of their challenge raises the question of whether the 2020 legislative measures which were adopted in response to this emergency are nonetheless disproportionate and unconstitutional.

19. In passing I should say that I am conscious of the fact that the regulations made under this legislation were very frequently changed, sometimes with relatively minor changes of detail. It would be all but impossible for me to survey every one of these changes in this judgment and I do not propose to do so. My judgment is accordingly principally – albeit perforce not exclusively – directed at the state of the law at the time the application for leave was first made to the High Court in April and May 2020. In some instances I have considered some of the changes which were made thereafter, but I do not propose to do so in a comprehensive fashion. I trust that this judgment nonetheless expresses my general views on many of the issues raised.

20. This is where I respectfully part company with the Chief Justice and my colleagues. They take the view that, in essence, this aspect of the case was regarded by the applicants as just a minor feature of these proceedings in which they had no real or genuine interest. There is, admittedly, much force in this, but I nonetheless take the view that the issues raised by the applicants are of such fundamental and far-reaching importance that they must nonetheless now be addressed. One may also observe in this context that it would seem that this will be the only case concerning the validity of the 2020 Regulations which is likely ever to make its way to this Court. It is for all these reasons that I consider it necessary to address these constitutional arguments.

21. I might also add that I take the view that since this remains an application for leave to apply for judicial review, it is only appropriate, at least in the special and exceptional circumstances of the case, to have regard to legislative developments which post-dated the applications in the High Court and the Court of Appeal.

22. As it happens, prior to the establishment of the Court of Appeal in October 2014, appeals from decisions of the High Court made *ex parte* were governed by the provisions of Ord. 58, r.13. These provisions of Ord 58, r. 13 were understood in practice to enable the party who suffered an *ex parte* refusal of an application in the High Court to renew that application *de novo* to the Supreme Court. In the case of judicial review applications, this meant that this Court could grant leave if it thought that the case presented arguable grounds rather than examining – as it would normally do if it were hearing an appeal in an *inter partes* matter – whether the High Court judge was correct. As I observed in *Arnold v. McCarthy* [2017] IECA 303, the provisions of the old Ord. 58, r. 13 have not, however, been replicated in the present Rules of the Superior Courts. It is, however, unnecessary to decide for present purposes whether the former practice of this Court with regard to *ex parte* appeals continues to apply simply

because the decision of the High Court at first instance was not given *ex parte*, but was delivered following an *inter partes* hearing.

23. One way or the other, I do not think that, having regard to the very special and unusual features of this case, this Court is necessarily confined to the state of law as it existed when the first application for leave was made before Meenan J. in the High Court in April and May 2020. This is especially true given the frequent and ever changing nature of the legislative measures which obtained during this period. All of this means that some consideration of the veritable *smörgåsbord* of ever-changing regulations and legislative developments which took place after the High Court decision of Meenan J. refusing leave is, *faute de mieux*, almost inevitable.

24. Lest, however, there be any lack of clarity on the point, I should also say that the fact that some or all of these legislative measures may have lapsed in the interval cannot – and must not – debar the courts from pronouncing on the constitutionality of these legislative measures. These measures – perhaps with very good reason – impacted on the constitutional rights of every person in Ireland, often in a far reaching way. The Oireachtas nevertheless cannot enact primary legislation (or, as the case may be, enable a Minister to make regulations under that legislation) providing, inter alia, for criminal penalties and offences which lapse after an interval and then escape judicial scrutiny simply because the measures have expired in the meantime. If this were to happen, "this Court would be failing to exercise that vigilance and care upon which constitutional rights and guarantees depend for their protection": see *Condon v. Minister for Labour* [1981] IR 62 at 70, per O'Higgins C.J.

25. Before proceeding to consider the many multi-faceted issues which arise in this important case, I consider it appropriate to mention one other consideration. The extended composition of this Court in respect of what is still a leave application

illustrates the far-reaching nature and importance of this case. While the applicants were fully entitled to represent themselves, I mean them no disrespect when I say that this case called for the presence of a specialist legal team. It is accordingly particularly unfortunate that they turned down the offer of *pro bono* representation which the Supreme Court Office offered to arrange. The presence of an *amicus curiae* – such as from the Irish Human Rights and Equality Commission – would, I think, also have been particularly helpful so that some of the wider considerations (e.g., an analysis of some of the Covid-19 case-law from other jurisdictions) could have been more readily available to this Court and, indeed, to the State parties.

26. The absence of a specialist legal team who might have advanced the challenge to these measures has considerably hindered the fair and proper presentation of this hugely important case. Not only did it place an undue burden on counsel for the State, it has also meant, for example, that many relevant legislative provisions and judicial authorities on which the applicants might have been expected to rely were simply not drawn to the Court's attention.

27. It would, for example, have been somewhat unreal that this Court should pronounce on the constitutionality of these novel and far-reaching public health measures without also having regard to the manner in which courts in other common law jurisdictions (such as the UK and the US) and EU jurisdictions (such as France and Germany) have dealt with these issues. In this judgment I have felt obliged to raise and discuss these matters simply by reason of their intrinsic importance, even though I fully recognise that this is all very far from satisfactory in circumstances where the Court was not referred to these authorities and where the parties accordingly did not debate their importance or their implications in either written or oral argument before the Court.

The test in *G v. Director of Public Prosecutions*

28. Here I agree with the Chief Justice regarding the nature of the test governing the grant of leave in the case of an application for leave on notice to the respondents is that articulated in *G v. Director of Public Prosecutions* [1994] 1 IR 384. While this Court has confirmed that the test in such cases remains that in *G* (see *DC v. Director of Public Prosecutions* [2005] 4 IR 281 at 289, per Denham J.), nevertheless if only by reason of the fact that the court has had the opportunity of considering both sides (including, as here, receiving evidence and hearing oral argument from the respondents), the court must be in a better position to assess whether an applicant has in fact made out an arguable case than in the ordinary case of an application for leave having been made on an *ex parte* basis: see, e.g., the comments to this effect of MacMenamin J in *CRA v. Minister for Justice and Equality* [2007] 2 ILRM 209 at 227 and those of Irvine J in *Ernest & Young v. Purcell* [2011] IEHC 203 (at paragraph 11).

29. At some point, however, the courts will probably be obliged to confront one of the more curious aspects of our civil procedure, namely, that in judicial review applications an applicant is required to put the case on affidavit and establish arguable grounds before obtaining leave, whereas – in principle, at least and subject in some instances to statutory constraints – such an applicant can by-pass the requirements of Order 84 and simply issue a plenary summons without the necessity for prior leave or putting matters on affidavit. In *Dún Laoghaire-Rathdown County Council v. West Wood Club Ltd.* [2020] IESC 43, [2020] 3 IR 417 at 452, McKechnie J. adverted to some of these difficulties, while indicating that they would have to be addressed in some future case. I can only agree with these sentiments.

30. Given, however, that the applicants have in substance brought a challenge to the constitutionality of the legislative measures and as such cases ordinarily proceed by

way of plenary summons, perhaps the most appropriate test of all in the circumstances of this case is to ask whether, if the proceedings had been so commenced, the High Court would have been entitled to strike out these proceedings as unsustainable under the court's inherent jurisdiction as identified in a long line of cases from *Barry v. Buckley* [1981] IR 306 onwards. I accordingly proceed to approach this appeal on this basis.

The presumption of constitutionality and the scope of judicial review

31. It is quite clear that the 2020 legislative measures enjoy a presumption of constitutionality, which presumption, in the celebrated words of O'Byrne J. in *Buckley v. Attorney General* [1950] IR 67 at 80, "springs from, and is necessitated by, that respect which one great organ of the State owes to another." Beyond this, however, the measures enjoy no special presumption such as might, for example, apply in the case of challenges to the validity of Finance Acts (see, e.g., *Madigan v. Attorney General* [1986] ILRM 136 at 151 per O'Hanlon J.) or to the validity of executive decision-making in the sphere of foreign affairs (see, e.g., *Horgan v. Ireland* [2003] IEHC 64, [2003] 2 IR 468).

32. It may be useful to recall that these measures affect in a far-reaching way core, fundamental constitutional rights. I fully accept that these measures were enacted for the most benign of reasons and the most worthy of motives in response to an acute public health emergency. This is clear not only from the Long Titles and the various recitals found in the 2020 legislative measures, but also having regard to paragraphs 124, 125, and 136 in particular of the affidavit of Ms. Bernie Ryan, a principal officer in the Department of Children dated 2nd May 2020 filed on behalf of the respondents.

33. At the same time one cannot overlook the fact the restrictions on personal liberty, home visits, religious observance and public assembly contained in these Regulations are

unprecedented in the history of the State. This is so even though during this hundred year period we have come through a Civil War, the threat posed by extremists of both Left and the Right alike in the 1930s, the Emergency/World War II, a long running civil conflict in Northern Ireland and the intermittent threat to the institutions of the State and the democratic order posed by illegal organisations.

34. This is not to deny that, for example, specific public meetings have from time to time in the past been occasionally prohibited: a well-known historical example is supplied by the prohibition order made by the Government pursuant to Article 2A of the Constitution of the Irish Free State in respect of the proposed march by the National Guard/Army Comrades Association to the rear of Leinster House which was due to be held on 13th August 1933. Yet it is clear that specific prohibitions of this kind were made – rightly or wrongly – by the Government of the day because of the perceived threat of political violence and serious public disorder. The point here is that up to now we have never had a *general* prohibition on peaceable assembly and public protest, even for a limited period, still less *general* restrictions on movement and travel or *general* controls on the number of visitors to our own houses.

35. I agree, therefore, with the approach to this issue which is, I think, admirably summarised by the majority of the US Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo* 592 US – (2020) who, when faced with a challenge to the validity of New York Covid-19 regulations curtailing attendance at religious ceremonies, observed that:

> "Members of this Court are not public health experts and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious

> services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure."

36. In that spirit one may say while great weight should naturally attach to the judgment of both the executive and legislative branches as to what measures can most practically and effectively be adopted to stop the spread of SARS-CoV 2, the unusual and far-reaching nature of these legislative restrictions on traditional liberties – cherished by the common law and Constitution alike – nonetheless calls for the closest judicial scrutiny, the presumption of constitutionality notwithstanding.

The power to declare an emergency and Article 28.3.3

37. Before proceeding further, it may be convenient to dispose of one issue on which the applicants placed some reliance. The applicants point to the fact that the 2020 measures were not enacted under cover of Article 28.3.3 of the Constitution: there was in fact no declaration of emergency for this purpose. It is clear, of course, that Article 28.3.3 can only be invoked where there is either a time of war or armed rebellion. The phrase "time of war" is defined as including a time of armed conflict in which the State is not a participant but in respect of which each Houses of the Oireachtas have resolved that "arising out of such armed conflict, a national emergency exists affecting the vital interests of the State."

38. Article 28.3.3 can thus only be invoked where there is a time of war or armed conflict. It accordingly has no application to the present case. The applicants contend, however, that there is no power to declare an emergency *other* than that specified in Article 28.3.3. I agree that the only circumstances in which the operation of the Constitution can be overridden in certain circumstances is where the legislation in question has been enacted under cover of Article 28.3.3. But this does not mean that there is *no other*

power on the part of the Oireachtas to recognise the existence of an emergency, the only difference is that in the case of these other emergencies the legislation does *not* enjoy the immunity from constitutional challenge contemplated by Article 28.3.3.

39. In passing one might note that s. 1(1) of the Protection of the Community (Special Powers) Act 1926 expressly gives the Government power to proclaim that a national emergency has arisen "of such character that it is expedient in the public interest that extraordinary measures should be taken to ensure the due supply and distribution of the essentials of life to the community." Such a proclamation of emergency lasts for a month unless extended and s. 2 gives the Government general power to regulate the supply of food, fuel and other necessaries during the course of the emergency.

40. At all events, the existence of a wider emergency power is clear – albeit indirectly – from the text of Article 24 itself. This provides for a procedure where the President may, after consultation with the Council of State, consent to an abridgement of time for the consideration of a Bill by the Seanad where the Taoiseach certifies that the Government is of opinion that the measure is urgent "and immediately necessary for the preservation of public peace and security, or by reason of a public emergency, whether domestic or international." To this one could add the provisions of Article 38.3.1 allowing for the establishment of the Special Criminal Court where it has been determined in accordance with law that "the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order"; Article 38.4.1 allowing for military tribunals to be established "to deal with a state of war or armed rebellion" and Article 40.4.5 providing that the provisions of Article 40.4.2 dealing with habeas corpus cannot be invoked as against the Defence Forces "during the existence of a time of war or armed rebellion."

41. The very language of Article 24.1 – which is clearly different from that of Article 28.3.3 – contemplates the existence of a public emergency (other than one prompted by war or armed rebellion) in which the Oireachtas may have to act with great urgency. There would seem to be no reason why the threat posed by an epidemic would not fall into this category. And, moreover, as Birmingham P. observed (at paragraph 24) in his judgment for the Court of Appeal, we already have had financial emergencies and one could equally "imagine emergencies caused by adverse weather conditions or by natural disasters."

42. As Mr. Waters correctly noted in his oral submissions, this general issue was addressed by Gavan Duffy J. in *The State (Burke) v. Lennon* [1940] IR 136 at 145. Referring to Article 24, Article 28 and Article 38, Gavan Duffy J. said:

> "The need to provide for times of emergency was clearly foreseen and the emergencies in contemplation where defined… There is no provision enabling the Oireachtas or the Government to disregard the Constitution in any emergency short of war or armed rebellion."

43. It follows, therefore, that the Constitution recognises the existence of an emergency *other* than one which invokes Article 28.3.3, save that in such circumstances the Constitution *can* be invoked as against the statute or statutory instrument effecting the restrictions. As I put it in *Dowling v. Minister for Finance* [2018] IECA 300 (at paragraph 114), [2020] 2 IR 273 at 315:

> "Even, however, in an economic emergency the law is not silent, although under such conditions her voice is, admittedly, at time slightly quieter – even fainter – than is usually the case. In a democratic state based on the rule of law, that voice must nonetheless be sufficiently courageous and powerful to insist on adherence to basic constitutional norms such as due process and the protection

of the substance of constitutional rights, even if some accommodation for the exigencies of the situation is also understandable and necessary."

44. These are the principles which I suggest are applicable in any review of the constitutionality of any of the Covid-19 related legislative measures at issue in this case.

The role of evidence in any proportionality challenge

45. In the High Court Meenan J. stated (at paragraph 54) that "in order to make an arguable case that these restrictions and limitations of rights are disproportionate, it was necessary for the applicants to put on affidavit some facts which, if proven, could support such a case." A similar view appears (implicitly) to have been adopted by Birmingham P in his judgment for the Court of Appeal.

46. I think, with respect, that this is too absolutist a position. It is quite often possible for an applicant to succeed in a proportionality-based challenge to the constitutionality of a law by simply establishing basic facts demonstrating that they have been affected by the operation of the impugned law such that they have the necessary standing to advance their respective cases: the decisions of this Court in *Cox v. Ireland* [1992] 2 IR 503 and that of Costello P. in *Daly v. Revenue Commissioners* [1995] 3 IR 1 are just early examples of successful proportionality challenges of this kind.

47. The constitutionality of a law is ultimately a matter for judicial assessment. While, as Henchy J. said in *The State (P. Woods) v. Attorney General* [1969] IR 385 at 399, "the Courts will not lightly or casually declare an enactment of the Oireachtas to be unconstitutional", such a decision is nevertheless generally based on a variety of considerations: constitutional text, precedent and constitutional history, reference to constitutional principles and analysis both here and abroad, regard for the common law heritage, judicial experience, well known and widely available open source information and, ultimately, judicial reasoning and legal logic.

48. Of course, expert evidence is often of great assistance and relevance. Thus, for example, in *Enright v. Ireland* [2003] 2 IR 321 the State tendered expert evidence in order to demonstrate that the registration and other similar requirements contained in the Sex Offenders Act 2001 were proportionate to the particular risk of recidivism posed by sex offenders. But it cannot be the case that the constitutionality of a law is determined by expert evidence alone.

49. The classic case of where this was at issue is, of course, *Norris v. Attorney General* [1984] IR 36. Here the plaintiff adduced a range of medical, psychiatric and other evidence to support his case that 19th century legislation criminalizing male homosexual acts violated his constitutional right to privacy while the State elected to call no evidence in response. While a majority of this Court nonetheless upheld the constitutionality of the legislation, the minority were critical of the fact that the expert evidence adduced by the plaintiff had been effectively ignored. As Henchy J put it in his dissent (at 77):

> "The question whether the constitutional provisions he relied on gave the necessary justification depended on a complex of expert evidential considerations – social, moral, medical and others – and, since the unrebutted consensus of the evidence was against the existence of such justification, the judge was debarred from holding otherwise."

50. My difficulty, however, with this passage is that it appears to rest on the assumption that a finding of unconstitutionality can be compelled where the expert evidence points in one direction. For all the reasons I have just mentioned, I think that an approach which might be justifiable in, say, the case of a finding of fact necessary to support a claim in medical negligence does not apply – at least with the same force – in the context of constitutional adjudication *so far as it concerns the ultimate issue of the*

validity of the law in question. In any event, just as experts cannot seek by their evidence to foreclose a judicial adjudication of the ultimate issue (such as whether a defendant was negligent) in the realm of private law, the same ought to be true in the sphere of constitutional law.

51. In the context of the 2020 legislative measures, one could readily envisage instances where a suitable plaintiff or applicant could appropriately launch a constitutional challenge without expert or other evidence. One example which immediately comes to mind are the restrictions contained in Article 5(1) and Article 5(3) of the Health Act 1947 (Section 31A -Temporary Restrictions) (Covid-19) Regulations 2020 (SI No. 121 of 2020) which (as extended) applied between April 2020 and June 2020 ("the 2020 Regulations"). While I propose to return to examine these provisions in due course, on one view the effect of these provisions was to preclude *all* forms of peaceable assembly for the purposes of political protest during that period. It was – and is – certainly open to these applicants to say that such a measure was simply unconstitutional on its face, irrespective of the concerns which medical and other experts might express regarding the potential spreading of the virus on such occasions.

52. None of this, incidentally, is to endorse the actual conclusion of the majority in *Norris*. The verdict of history has long since been unequivocally on the side of the minority judgments of Henchy and McCarthy JJ in that case. It is simply to say that the majority in that case are not to be faulted *merely* by reason of the fact that they reached their own conclusions on the ultimate issue of constitutionality in a manner which was not constrained by the conclusions of the expert witnesses who had given evidence in the High Court.

53. All of this, therefore, is to say that, with respect, I consider that Meenan J. fell into error in his conclusions regarding the absence of expert and other evidence. This was not in any sense an insuperable obstacle to the grant of leave in these proceedings.

54. Against that background I now propose to examine the merits of the applicants' case by reference to the three principal grounds permitted to be argued by this Court's earlier Determination granting leave to appeal against the decision of the Court of Appeal, namely, freedom of assembly, personal liberty and inviolability of the dwelling.

The challenge based on freedom of assembly

55. In their affidavit of 15th May 2020 the applicants contend (at paragraph 25) that Article 5 of the 2020 Regulations directly affected them by "preventing and impeding our right to peaceful assembly whether for the purposes of peaceful protest, [whether] viewing the administration of justice in the Courts or otherwise." As I read their affidavit (and, indeed, grounding statement) the applicants say that they wished to engage in peaceful assembly but were prevented by the 2020 Regulations from doing so. Here it is first necessary to set out the relevant provisions of the Regulations and to examine their effect.

What does Article 5 of the 2020 Regulations provide?

56. The first tranche of restrictions were introduced pursuant to S.I. No. 121 of 2020, Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) Regulations 2020 ("the 2020 Regulations") which came into effect on 8th April 2020. Although the applicants in their affidavit rely in particular on the effect of Article 5 of the 2020 Regulations it is necessary for our purposes to examine the effect of Article 5 in conjunction with Article 4. Those Articles provide as follows:-

"**Restriction of movement of applicable persons**

4. (1) An applicable person shall not leave his or her place of residence without reasonable excuse.

(2) Without prejudice to the generality of what constitutes a reasonable excuse for the purposes of paragraph (1), such reasonable excuse includes an applicable person leaving his or her place of residence (in this paragraph referred to as the "relevant residence") to –

(a) provide, or assist in the provision of, an essential service, whether for remuneration or not,

(b) go to an essential retail outlet for the purpose of obtaining items (including food, beverages, fuel, medicinal products, medical devices or appliances, other medical or health supplies or products, essential items for the health and welfare of animals, or supplies for the essential upkeep and functioning of the relevant residence), or accessing services provided in the outlet, for the applicable person or any other person residing in the relevant residence,

(c) go to an essential retail outlet for the purpose of obtaining items (including food, beverages, fuel, medicinal products, medical devices or appliances, other medical or health supplies or products, essential items for the health and welfare of animals, or supplies for the essential upkeep and functioning of the place of residence of a vulnerable person), or accessing services provided in the outlet, for a vulnerable person,

(d) obtain money for -

(i) the applicable person,

(ii) any other person residing in the relevant residence, or

(iii) a vulnerable person,

(e) attend a medical appointment or accompany, to a medical appointment, any other person residing in the relevant residence or a vulnerable person,

(f) seek essential medical, health or emergency dental assistance for -

(i) the applicable person,

(ii) any other person residing in the relevant residence, or

(iii) a vulnerable person,

(g) donate blood or accompany any other person residing in the relevant residence to donate blood,

(h) seek veterinary assistance,

(i) exercise, either alone or with other persons residing in the relevant residence, within a 2 kilometre radius of that residence,

(j) attend to vital family matters (including to provide care to vulnerable persons),

(k) attend the funeral of -

(i) another person who resided in the relevant residence before his or her death, or

(ii) a close family member of the applicable person,

(l) fulfil a legal obligation (including attending court, satisfying bail conditions, or participating in ongoing legal proceedings), attend a court office where required, initiate emergency legal proceedings or execute essential legal documents,

(m) access an essential service, or assist any other person residing in the relevant residence or a vulnerable person to access an essential service, where the access is immediately required and the applicable person,

other person residing in the relevant residence or vulnerable person, as the case may be, cannot access the service concerned from the person's place of residence,

(n) if the applicable person is a parent or guardian of a child, or a person having a right of access to a child, give effect to arrangements for access to the child by -

(i) the applicable person, or

(ii) another person who is -

(I) a parent or guardian of the child, or

(II) a person having a right of access to the child,

(o) in the case of a minister of religion or priest (or any equivalent thereof in any religion) -

(i) lead worship or services remotely through the use of information and communications technology,

(ii) minister to the sick, or

(iii) conduct funeral services,

(p) move to another residence where, in all the circumstances of the case, such movement is reasonably necessary, or

(q) provide emergency assistance, avoid injury or illness, or escape a risk of harm, whether to the applicable person or another person.

(3) Paragraph (1) is a penal provision for the purposes of section 31A of the Act of 1947.

Restrictions on events

5. (1) A person shall not -

(a) hold an event in a relevant geographical area unless -

(i) the event is a relevant event, and

(ii) the number of participants in the event is limited to not more than is reasonably necessary having regard to the nature of the purposes for which the event is held,

or

(b) participate in an event in a relevant geographical area unless -

(i) the event is a relevant event, and

(ii) the person is a relevant participant.

(2) Paragraph (1) is a penal provision for the purposes of section 31A of the Act of 1947.

(3) In this Regulation -

"relevant event" means an event held for the purposes of any matter which falls within any subparagraph of Regulation 4(2);

"relevant participant", in relation to a relevant event, means a person who participates in the event in order to engage in any activity required to be undertaken for the purposes for which the event is held."

57. The first point to note is that, in view of the express words of Article 5(2), it is clear that a breach of Article 5(1) amounts to a criminal offence.

58. The second – perhaps more fundamental – point is that despite the twin presumptions against unclear changes in the law and doubtful penalisation (for which see, for example, the comments of Henchy J in *Minister for Industry and Commerce v. Hales* [1967] IR 50 at 76-77 and *Director of Public Prosecutions v. Flanagan* [1979] IR 265 at 280-281 respectively), it would appear that the language of Article 5 excludes peaceful protest. This is because Article 5 prohibits a person from holding an event

unless it is a "relevant event." A relevant event is defined in Article 5(3) by reference to the subparagraphs of Article 4(2), which encompass certain enumerated activities (such as, for example, shopping for household necessities) that give an applicable person a "reasonable excuse" to leave his or her place of residence.

59. Although Article 4(1) itself would appear to envisage that other activities, in addition to those reflected in the subparagraphs of Article 4(2), might fall within the "generality of what constitutes a reasonable excuse", the wording of Article 5 – with its specific reference to the particular enumerated activities contained in the subparagraphs of Article 4(2) – would seem to envisage that *only* those activities contained within the subparagraphs of Article 4(2) are capable of grounding a "relevant event" for the purposes of Article 5(3). Crucially, assembly for the purposes of peaceful protest does not come within any of the enumerated activities specified in Article 4(2) and would thus seem to be excluded from the definition of "relevant event" in Article 5(1).

60. It is important at this point to note that the 2020 Regulations remained in force for a two month period. Although S.I. No. 121 of 2020 had an initial expiry date of 12th April 2020, the expiry date was thrice amended, first by S.I. No. 128 of 2020 to 4th May 2020, then again by S.I. No. 152 of 2020 to 18th May 2020, and finally by S.I. No. 174 of 2020 to 8th June 2020. From 8th June 2020 Ireland then entered Phase 2 of its "Roadmap for Reopening Society and Business" which allowed certain events to take place provided that the maximum number of persons attending did not exceed 15 persons (see S.I. No. 206 of 2020).

61. The upshot of this is that if my analysis of the effect of Article 5(1) and 5(3) of the 2020 Regulations (read in conjunction with Article 4(2)) is correct, then it would appear that the 2020 Regulations did in fact make it a criminal offence to engage *in any form* of peaceful protest at least until 8th June 2020.

What does Article 6 of SI No. 206 of 2020 provide re peaceful protests?

62. I use the words "at least" because it is, to my mind, not entirely clear whether peaceful protest was thereafter permitted under the provisions of S.I. No. 206 of 2020, which revoked and replaced the statutory instrument set out above. A complication here is that S.I. No. 206 was promulgated *after* the decision of the High Court in May 2020 but *before* the decision of the Court of Appeal. As I have already indicated there was, indeed, such a veritable *smörgåsbord* of ever-changing regulations that a proper consideration of what was in force at any given time has been rendered very difficult.

63. Of particular relevance in this respect are the provisions of Article 6 of S.I. No. 206 of 2020 which provides as follows:-

> "**Restriction on events**
>
> 6. (1) A person shall not organise, or cause to be organised, an event for cultural, entertainment, recreational, sporting, social, community or educational reasons other than –
>
> (a) where one or both of the following applies:
>
> (i) the maximum number of persons attending, or proposed to attend, the event (for whatever reason) does not exceed 15 persons;
>
> (ii) the person organising the event or causing the event to be organised takes all reasonable steps to ensure that the number of persons attending, or proposed to attend, the event (for whatever reason) does not exceed 15 persons,

or (b) where the event is for educational reasons, it is held, or to be held, in a school, university, higher education facility, crèche or other registered childcare facility.

(2) Paragraph (1) is a penal provision for the purposes of section 31A of the Act of 1947."

64. Viewed in isolation it might seem that the right to protest is unaffected by Article 6. This is because Article 6 would appear to restrict only those events that fall within the categories enumerated in Article 6(1) and it is not clear that peaceful protest would fall within any of those categories. One might, moreover, expect that if the right to protest was abridged or curtailed in the manner detailed in Article 6(1)(a) that the Minister would have done so in express words. This is certainly a tenable interpretation.

65. Yet this interpretation – while tenable – nonetheless seems an unlikely one in the circumstances in view of the surrounding context. In light of the statutory instruments that had gone before it and the statement in the recitals contained in SI No. 206 of 2020 about the "immediate, exceptional and manifest risk posed to human life and public health by the spread of Covid-19" it would be surprising if the Minister by the words used in Article 6 had intended to allow unrestricted public protests, regardless of numbers, social distancing or any other similar considerations. What is, I suggest, more plausible is that the Minister had intended to allow the categories of events enumerated in Article 6(1) and these events only, provided that they abide by the requirements set out in Article 6(1)(a) or 6(1)(b).

66. If this is correct then it would seem that the general ban on all peaceful protest continued under the provisions of S.I. No. 206 of 2020. I say this because I am not convinced that peaceful protest would fall within any of the categories set out in Article 6(1). In this respect, the starting point for the construction of the categories enumerated in Article

6(1) is the meaning of the words used in ordinary language. Put another way, one might ask: does peaceful protest fall within the natural meaning of any of the categories of events set out in Article 6(1)?

67. I think immediately one can say that peaceful protest could not – on any interpretation – be considered a "sporting" event. And while, moreover, some people might claim that peaceful protests do have a "cultural", "entertainment", "recreational", "social" and/or "educational" value (perhaps, for example, because attendees have an opportunity to meet new people or learn more about the cause they are supporting), I do not think peaceful protests could be said to fall within the *natural* meaning of any of these words.

68. That leaves us, therefore, with the question of whether peaceful protest might fall within the natural meaning of a "community" event. It is helpful at this juncture to consider the importance of context as a guide to the proper scope of a statutory provision. Thus, for example, in *Dillon v. Minister for Post and Telegraphs*, Supreme Court, 3 June 1981, which concerned the question of whether Mr. Dillon's election leaflet (which described politicians as "dishonest") was "grossly offensive" within the meaning of the Inland Post Warrant 1939. In his judgment for this Court Henchy J stressed that the words could not be simply read in isolation, but rather must be read in the context of the rest of the adjoining statutory language:

> "But the embargo is not simply against the words of a grossly offensive character. The embargo is against 'any words, marks, or designs of an indecent, obscene or grossly offensive character'. That assemblage of words gives the words a limited and special meaning to the expression 'grossly offensive character.'
>
> Applying the maxim n*oscitur a sociis* …, the expression 'grossly offensive character' must be held to be infected in this context with something akin to the

> taint of indecency or obscenity. Much of what might be comprehended by the expression if it stood alone is excluded by its juxtaposition with the words 'indecent' and 'obscene.' This means that the Minister may not reject a passage as disqualified for free circulation through the post because it is apt to be thought displeasing or distasteful. To merit rejection it must be grossly offensive in the sense of being obnoxious or abhorrent in a way that brings it close to the realm of indecency or obscenity. The sentence objected to by the Minister, while many people would consider it denigratory of today's politicians, is far from being of a 'grossly offensive character ' in the special sense in which that expression is used in the Act."

69. In a similar vein, in his judgment in the Chancery Division of the High Court of England & Wales in *Bourne (Inspector of Taxes) v. Norwich Crematorium Ltd.* [1967] 2 All ER 576, Stamp J explained the rule of *nocitur a sociis* (at 578) in the following terms:

> "English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language. That one must construe a word or phrase in a section of an Act of Parliament with all the assistance one can from decided cases and, if one will, from the dictionary, is not in doubt; but having obtained all that assistance, one must not at the end of the day distort that which has to be construed and give it a meaning which in its context one does not think it can possibly bear."

70. Taken in isolation and separated from the other words of Article 6(1), it is true that a peaceful protest might on some interpretation be said to be a "community" event. Protests are, after all, sometimes organised to draw attention to community concerns, both on a national and local level, and protesters themselves are often made up of a particular community, whether by virtue of, for example, their locality, ethnicity or political belief. For my part, however, I do not think that protests could be said to be a "community" event *in the specific context of Article 6(1)*. I take this view for two reasons.

71. First, in light of the other categories of events contained in Article 6(1), it would appear to me that the more natural meaning of the word "community" in this context is in respect of an event that takes on the character of being recreational or leisurely in nature. This interpretation, I think, reflects the general tenor of the other categories of events enumerated in Article 6(1). Such community events might include, for example, meetings of community groups, charity events and country fairs and markets.

72. Second, on any possible interpretation of Article 6(1), it must be accepted that the Article is at least ambiguous as to whether peaceful protests are permitted (to the extent prescribed in Article 6(1)(a)). It is, in this respect, worth making the point that one would not expect a right as important as the right to freedom of assembly and protest – which is fundamental to any free and democratic society – to be given effect through the strained construction of the categories contained in Article 6(1).

73. To my mind it is, ultimately, far from clear whether peaceful protest was allowed under S.I. No. 206 of 2020 and, in particular, under the provisions of Article 6. The whole tenor of Article 6 and the context in which the Minister made the regulations leaves, in my view, a real doubt as to whether peaceful protest was allowed. And that, I suggest, is sufficient in itself to raise a significant constitutional issue in its own right. This, after

all, was the very point made by the High Court of England and Wales in *Leigh v. Commissioner of Metropolitan Police* [2022] EWHC 527 (Admin)*:* the very lack of clarity on the part of the London Metropolitan Police as to whether they would take enforcement action under the corresponding provisions of the UK Coronavirus Regulations against persons taking part in a protest vigil was itself sufficient to raise significant issues under Article 10 ECHR and Article 11 ECHR.

74. Either way, both on the issue of interpretation and the constitutionality of Article 6 of SI No. 2020, the applicants have raised important issues and ought to be granted to leave in this respect also.

The relevance of Article 40.6.1 of the Constitution

75. Article 40.6.1 of the Constitution, while expressly protecting the right of peaceable assembly without arms, also expressly enumerates three types of circumstances in which the holding of public meetings may be prevented by law. The first is where "it has been determined in accordance with law to be calculated to cause a breach of the peace." The second is where the meeting is calculated in accordance with law to be "a danger or nuisance to the general public." (This, incidentally, is why legislation which prevented the holding of a public meeting immediately adjacent to the Cliffs of Moher – an example proffered in oral argument by Mr. Collins SC – would survive constitutional scrutiny). The third is a general power is to prevent meetings in the vicinity of either Houses of the Oireachtas. It is unnecessary to consider any of the three exceptions in any detail, save to observe that they have no application at all to the point which the applicants seek to make in the present case regarding freedom of assembly.

76. It is also unnecessary to consider whether there are *other* circumstances – apart from these three constitutionally enumerated instances – in which the Oireachtas could enact legislation *preventing* the holding of public meetings. It probably could: the right of

freedom of assembly in Article 40.6.1 is, after all, expressly subject to considerations of public order and morality. There may be other circumstances in which considerations of public order and morality would support the constitutionality of legislation which sought to *prevent* the holding of public meetings *other* than these three enumerated cases.

77. This, however, is not quite the issue which arises here. If, for example, the foregoing analysis of the effect of Article 5(1) and Article 5(3) of the 2020 Regulations (read in conjunction with Article 4(2)) is correct then the effect of this prohibition would *appear* to have been that *all* peaceable assembly for the purposes of public protest was prohibited under pain of criminal sanction during this two month period between April and June 2020. While not necessarily accepting that the Regulations had this effect, Mr. Collins SC suggested that if this was indeed so, this was nonetheless a legitimate policy choice on the part of the Oireachtas (and, by extension, the Minister for Health when making the Regulations) in response to the pandemic. I cannot agree.

78. The rights of peaceable assembly and the right to express freely one's convictions and opinions are part of the life blood of any free and democratic society. It is irrelevant in this context that persons are free to express their views in other ways and by other means. Experience both in this country and elsewhere has shown that peaceful public protests are among the most effective means of communicating grievances and securing political change. As I put it in *Doherty v. Referendum Commission* [2012] IEHC 211, [2012] 2 IR 594 at 603 the Constitution "envisaged a plebiscitary as well as a parliamentary democracy and, in doing so, it has created a State which can demonstrate – in both word and deed – that it is a true democracy worthy of the name."

79. In *The State (M.) v. Attorney General* [1979] IR 73 at 79 Finlay P. observed that:

> "One of the hallmarks which are commonly accepted as dividing States which are categorised as authoritarian from those which are categorised as free and democratic is the inability of the citizens of, or residents in, the former to travel outside their country except at what is usually considered to be the whim of the executive power."

80. One may equally say that the right of peaceful protest and peaceable assembly is one of the defining hallmarks of a democratic State. If, therefore, the effect of the 2020 Regulations was to prohibit *all* public political protests during this two month period then part of the essential guarantee of Article 5 of the Constitution in respect of the State's democratic character would have been compromised. The commitment to democracy is in this sense inviolable and, save for the special circumstances of legislation passed under cover of a declaration of emergency passed under Article 28.3.3, this is a constitutional bedrock which lies beyond the capacity of either the Oireachtas or the Government to compromise, irrespective of the reasons for such restrictions or their motives for so acting.

81. It might be noted in passing that broadly similar sentiments are to be found in the judgment of the German Constitutional Court in its decision of 16th April 2020 (DE:BVerfG: 2020: rk2020415.1bvr082820); that of the French Conseil d'État in its decision of 6th July 2020, *Confédération Générale du Travail et autres* (at paragraph 22), and most recently the decision of the High Court of England and Wales in *Leigh v. Commissioner of Metropolitan Police* [2022] EWHC 527 (Admin) (at paragraphs 118 and 120 of the judgment of Holgate J.) in respect of challenges to aspects of the COVID-19 regulations in each of these jurisdictions. The German Constitutional Court decision was based on the right of freedom of assembly in Article 8 of the Basic Law (the language of which is in some respects strikingly similar to Article 40.6.1). The

decisions in *Confédération Générale du Travail* and *Leigh* were based on Article 10 and Article 11 of the European Convention of Human Rights respectively. (The Conseil d'État also invoked the similar guarantees of freedom of assembly in the French Constitution of 1958).

82. In response to this objection, counsel for the State, Mr. Collins SC, drew attention in the course of oral argument to the fact that at least one large scale anti-racism demonstration was permitted to take place in Dublin and Cork (and elsewhere) during the currency of these Regulations, apparently without objection from the authorities. If I understood Mr. Collins' point correctly, his suggestion was that the apparently total prohibition effected by the 2020 Regulations was to some degree mitigated by the official tolerance shown of this particular public demonstration. For my part, I do not find this at all reassuring: if anything, it makes the situation even worse.

83. A law of this nature must be applied neutrally to all persons wishing to assemble publicly for the purposes of peaceful protest. Neither the Government nor the Garda authorities enjoy a discretion effectively to suspend the law to accommodate favourite protests in this fashion while at the same time – to take another well-known example from this period – citing these self-same regulations in order to deny striking workers the right to protest after they had been made redundant shortly after the start of the pandemic in March 2020. The Constitution could not be clearer on this point: Article 40.6.2 expressly provides that laws "regulating the manner in which…the right of free assembly may be exercised shall contain no political, religious or class discrimination." Yet if Mr. Collins SC is correct, one has to suspect that this is precisely what has occurred.

84. It is in this situation that the potential for the arbitrary and uneven application of the law is at its greatest. This was the very point made by Jackson J in *Railway Express Inc v. New York* 336 US 106 at 112-113 (1949):

> "…there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

85. Here again one would not wish to be misunderstood. The constitutional objection is to the (apparently) complete and overbroad nature of the prohibition on public assembly contained in Article 5(1) of the 2020 Regulations. If, for example, the 2020 Regulations had imposed limits on the numbers who might attend such an event or stipulated that social distancing must be observed, entirely different considerations would apply. This point, as it happens, was also made by the German Constitutional Court in its ruling of 16th April 2020 (at paragraph 12 of the judgment) when it stressed that the Covid regulations of the Land Hesse (one of the legislative measures under consideration in that case) did *not* contain a *general* ban on public protest.

86. The applicants have accordingly raised issues of very considerable constitutional importance regarding peaceable assembly. They clearly meet the test required of applicants seeking leave to apply for judicial review – and, in this instance, have done so by a wide margin – in respect of their challenge to the constitutionality and vires of Article 5(1) and Article 5(3) (when read in conjunction with Article 4(2)) of the 2020

Regulations). The same is broadly true of Article 6 of SI No. 206 of 2020, although the correct interpretation of this provision is, perhaps, open to more debate.

87. Contrary to what the majority of the Court appears to suggest, I consider that the applicants have at least demonstrated arguable grounds that they enjoy the requisite standing to advance this particular argument. It is, after all, necessarily implicit in these very proceedings that they object to the restrictions on freedom of assembly imposed by the various iterations of these Regulations. If, for example, the effect of Article 5 of the 2020 Regulations was to exclude all forms of public protest, then given the far-reaching nature of such a restriction it would not, for example, be necessary for the applicants to demonstrate that they had sought permission from the authorities for such a protest and were refused. It would, I think, be sufficient for them to say that as citizens they objected to such an intrusive legal regime which had the effect of dissuading them and others from engaging in such protest.

88. Again, it must be recalled that we are simply dealing with the issue of leave to apply for judicial review. Even if leave were to be granted on this issue, it would always be open to the respondents to advance a case in response in the High Court – whether by evidence or argument – that the applicants did not in fact enjoy the requisite *locus standi* to make this case or even that they had no real genuine interest in pursuing this claim. For my part, I consider that the applicants can show in respect of this point not only that the facts averred on affidavit "would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review", but that they have also presented "arguable grounds" in respect of the freedom of assembly arguments (and their standing to do so) for this purpose: see *G. v. Director of Public Prosecutions* [1994] 1 IR 374, 378, *per* Finlay C.J.

89. I would accordingly grant the applicants leave to seek a declaration by way of judicial review that these provisions are, first, ultra vires s. 31A of the 1947 Act (as inserted by the 2020 Health Act) and, second, unconstitutional insofar as they effect a complete and total ban on the organization or participation in a public protest. Inasmuch as this will require an amendment of the grounding statement so that the applicants should seek declarations of invalidity and unconstitutionality in respect of these provisions rather an order of certiorari as such, I would grant the necessary leave for this purpose in accordance with the provisions of Ord. 84, r. 20(4)(a) RSC.

The restrictions on personal liberty

90. There is no question at all but that the 2020 legislative measures impacted in a far reaching way on the right to personal liberty as protected by Article 40.4.1. It is probably not necessary for me to set out the detailed rules and their exceptions, not least because the details of these rules were frequently changed from time to time. It is sufficient to say that the effect of the 2020 Regulations was largely to confine the population to their own houses, subject to important exceptions such as permitting the purchase of household necessities in local shops (Article 4(2)(b)); assisting the elderly (Article 4(2)(j)); attending the funerals of family members (Article 4(2)(k)); attendance in court (Article 4(2)(l)) and engaging in recreational exercise within 2km of one's own residence (Article 4(2)(i)).

91. One can take judicial notice of the fact these measures affected the daily lives and traditional liberties of every citizen and resident of the State. A legislative restriction of this kind affecting the guarantee of personal liberty in Article 40.4.1 must, however, not be inconsistent with the "fundamental norms of the legal order posited by the Constitution": *King v. Attorney General* [1981] IR 223 at 257 per Henchy J.

92. The legal basis for these restrictions is now contained in s. 31A of the Health Act 1947 ("the 1947 Act"), as inserted by s. 10 of the Health Act 2020. It is now perhaps forgotten how (relatively) controversial the 1947 Act was when it was first enacted with serious concerns being expressed at the time as to its constitutionality. Indeed, a meeting of the Council of State was convened by President O'Kelly to consider whether in particular Part III of the Health Bill 1947 (providing for compulsory medical examination) should be referred to this Court pursuant to Article 26. In the end the measure was signed into law by the President and no Article 26 reference was made: see *The Irish Times*, 15th August 1947.

93. Section 31 of the 1947 Act was contained in Part IV of that Act dealing with infectious diseases. This seems primarily to have directed at the curbing the spread of tuberculosis, which had then – this was at a time when antibiotics were still in their infancy – both a high morbidity and a high mortality rate. Section 31(1) provided that any person who knows that "he is a probable source of infection with an infectious disease shall…take every reasonable precaution to prevent his infecting others with such disease by his presence or conduct or by means of any article with which he has been in contact." Section 31(2) imposed a similar obligation in respect of those caring for infected persons: they were similarly obliged to take reasonable precautions to avoid infecting others.

94. Section 38 went further and provided for the compulsory detention of infected persons. The constitutionality of this section was, as it happens, upheld by Edwards J. in *S v. Eastern Health Board* [2009] IEHC 106 on the basis that the safeguards contained in that section were adequate to protect the right to personal liberty.

95. The principal legislative response to the public health emergency – s. 31A of the 1947 Act – was, in fact, grafted on to that Act by s. 10 of the Health Act 2020. It is true that,

as the applicants maintain, the effect of this amendment is to significantly alter the scope of the original Part III of the 1947 Act. Whereas Part III is directed towards the control of *infected persons*, the new s. 31A allowed for the control and regulation of the movements and activities of *every person* in the State, *whether infected or not*. This legislative change was doubtless deemed necessary in view of the undisputed medical evidence that because persons infected with Covid-19 may also be asymptomatic, they may also unwittingly infect others.

96. While restrictions of this kind on personal liberty are tiresome and intrusive – and, admittedly, in some instances, a good deal more than that – they must often in principle be accepted as part of the State's duty to protect the right to life and person of its citizens. Furthermore, Article 9.3 of the Constitution makes it clear that citizenship implies duties as well as rights. At a time of a public health emergency, citizens must often accept some *short-term* restrictions on traditional liberties in the common good while the State endeavours to grapple with a public health emergency of this nature and seeks to address the nature of the problems it presents.

97. But if this is so, this must be counter-balanced by a high level of legislative scrutiny in order to ensure, first, that the proportionality of these measures is continuously assessed and, second, to see that democratic accountability in respect of such a far-reaching measure is assured by the persons who are directly democratically answerable to their respective electorates, i.e., the Houses of the Oireachtas. Put another way, the "fundamental norms of the legal order" posited by Henchy J. in *King* would seem to require this high level supervision if these traditional freedoms and liberties are to be circumscribed in this unprecedented fashion.

98. The proportionality issue is of particular importance because of the dynamic and ever-changing nature of the emergency: what was thought necessary at first may in fact no

longer be so as our understanding of the science and the medicine evolves and the nature of the particular public health challenge becomes clearer and comes into sharper focus. One may take judicial notice of the fact that SARS-CoV2 is now, for example, understood to be an airborne virus, so that it is more highly transmissible *inside* as opposed to *outdoors.* As that thinking evolved in the months that followed the initial Wuhan outbreak, it could be said that the case for assessing the proportionality of the legislative measures became stronger, certainly so far as restrictions on *outdoor* movement were concerned. Epidemiological evidence from that period might well cast more light on what was effective and what was not.

99. The same is true of the issue of democratic accountability. The Oireachtas cannot simply enact empowering legislation such as the Health Act 2020 and then, so to speak, walk away from the problem. If the Oireachtas is going to interfere with fundamental constitutional rights in this unprecedented fashion, it must ensure that it accounts to the electorate by taking personal responsibility for this legislation and ensuring that the necessity for these legislative measures and the regulations made thereunder is kept under constant review by it.

100. Summing up, therefore, on this point I consider that given the novelty and gravity of the public health emergency, no serious constitutional issue arises in respect of short-term restrictions on personal liberty to travel and to move around so far as these *short-term* restrictions are concerned. This is especially so given that Article 4(2) of the 2020 Regulations contained important exceptions such as permitting travel for the purchasing of household necessities, caring for vulnerable persons, permitting essential workers to go to work and providing for exercise within a 2km radius of one's principal private residence (the limit was in any event extended). Absent such exceptions the

proportionality of such a restriction on movement would have been far more difficult to uphold.

101. I have just spoken about short-term restrictions, which I would measure in the order of some three months or thereabouts. If that had been the only issue before the High Court, then I consider that Meenan J would have been correct in refusing leave in respect of this particular ground (personal liberty in Article 40.4.1) in these circumstances and on that basis. But by the time the matter had moved on to the Court of Appeal – which Court delivered judgment in March 2021 – it was perfectly clear that these types of restrictions were no longer short-term in character. In the meantime, the operation of the Health Act 2020 had been extended from time to time by resolution of both Houses before subsequently being made permanent by the Health (Amendment) (No. 2) Act 2021, s. 4(2)(ii) in July 2021 a few months after the Court of Appeal had given judgment. The fact that the Health Act 2020 could be extended by a resolution of both Houses beyond the original expiry date of 9th November 2020 was (and is) a specific complaint of the applicants: see paragraph 12 of the grounding statement.

102. Given the long-term nature of these restrictions; the changing nature of the societal response to and general understanding of the manner in which the virus was transmitted; the need for judicial scrutiny of the proportionality of these measures once they ceased to have a short term character, along with the indefinite prolongation and then legislative change so that s. 10 the Health Act 2020 became a permanent measure; these factors taken together all suggest that the applicants have indeed raised arguable grounds so far as the constitutionality (and general validity) of the 2020 legislative measures insofar as they restricted personal liberty of movement outdoors from 1st July 2020 onwards.

103. In this regard it may be noted that while the affidavit of Ms. Ryan very helpfully sets out the considerations which were generally extant in late April 2020 regarding the *general* need for restrictions on movement, it would not necessarily follow that this would always completely justify *specific* restrictions at a *later* stage. Thus, for example, the fact that the respondents can (as I have just held) justify short-term restrictions on freedom of movement and personal liberty does not mean that this will necessarily be true over the medium to long-term. The Oireachtas could hardly, for example, impose a *permanent* 2km restriction on outdoor exercise irrespective of new emerging factors such as the evolution of scientific and medical thinking regarding the nature of the risk of being outdoors or the prevalence of vaccination rates among the population.

104. I would accordingly grant the applicants leave to seek the appropriate declarations to this effect.

Inviolability of the dwelling

105. Article 40.5 of the Constitution guarantees the inviolability of the dwelling. This implies an area of personal autonomy of the occupants of the dwelling which is, generally speaking, free from legislative regulation. As Hardiman J put it, this provision "presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world": *The People (Director of Public Prosecutions) v. O'Brien* [2012] IECCA 68. Subject only, perhaps, to the general law as to nuisance, the decision to invite visitors or guests to the family home is usually entirely a matter for the householders concerned. This, moreover, is also part of the right of association protected by Article 40.6.1.

106. Yet control of the presence of infectious persons in a private dwelling is, historically, far from unknown. Part III of the 1947 Act contains a range of such examples. Thus, for example, s. 33 of the 1947 Act provides that it is illegal to sell or let a dwelling

within three months of an occupant suffering from an infectious disease without having given the appropriate notice to the Health Service Executive.

107. Again, historically, some of these powers – particularly the enforcement powers – evoked strong criticism, even shortly after their enactment. Thus, for example, s. 94(3) of the 1947 Act enables an authorised officer to "break open" a dwelling between the hours of 9am and 6pm "if being unable, after reasonable inquiry, to find a person from whom to demand admission" for the purposes, inter alia, of inquiring "whether circumstances exist on or in connection with the premises which would require any action to be taken under this Act or the regulations made thereunder." The striking and far-reaching nature of this power – unfettered, it seems, by any express provision contained in the language of the section requiring the authorized officer to demonstrate the existence of reasonable grounds for such a step – prompted one contemporary commentator to complain that this provision "makes nonsense of the constitutional guarantee of the inviolability of our homes", adding that "it could hardly stand the test of a court action": FC King, "Administrative Law" (1951) 85 *ILTSJ* 155 at 162-163.

108. There is no doubt at all but that the impact of the 2020 legislative measures were significantly intrusive so far as they sought to control or regulate the presence of visitors in our homes. To that extent these legislative measures affected virtually every person in the State by impacting not only on the inviolability of the dwelling, but also by affecting the right of association with others contained in Article 40.6.1. While it is true that Article 4(2)(j) of the 2020 Regulations made exceptions for the care of vulnerable and elderly persons, the desire for friendship and company is by no means the preserve of the elderly. Human beings are by nature social creatures and the practice of providing hospitality in our own houses to relatives, friends and visitors is one with deep historical roots in all societies. One does not need to be a psychologist to realise that isolation and

loneliness over a long period can have depressive and other effects on the general mood and psychology of many and not just simply the old and vulnerable.

109. At the same time, the State's interest in regulating domestic conduct in the context of a pandemic is very strong, if not, indeed, compelling. The risk of the spread of infection in an indoor setting – often perhaps attended by circumstances of conviviality where both hosts and guests alike were less on their guard – is very high, especially where the house itself is poorly ventilated with windows and doors closed.

110. For my part, given these compelling interests, I consider that no serious constitutional issue in respect of the guarantees of inviolability in Article 40.5 and the right of association in Article 40.6.1 (in the sense of hospitality and home visits) would arise over the *short term*. The express exception in favour of visiting and caring for the elderly and vulnerable contained in Article 4(2)(j) of the 2020 Regulations is a vital safeguard which contributes to the overall proportionality of this measure.

111. Different considerations, however, obtain once the restrictions on home visits move beyond the short term, even if the State's interest in controlling indoor activity in the context of a pandemic caused by an airborne virus will always remain elevated for the reasons just mentioned. While once again the affidavit of Ms. Ryan very helpfully sets out the considerations which were generally extant in late April 2020 regarding the *general* need for restrictions on home visits, it would not necessarily follow that this would always completely justify *specific* restrictions at a *later* stage. Thus, for example, the fact that the respondents can (as I have just held) justify short-term restrictions on home visits of this kind does not mean that this will necessarily be true over the medium to long-term, although as I have already stated greater allowance must be made for the State's interest in controlling the spread of the SARS-CoV 2 virus in respect of indoor venues. Yet the Oireachtas could hardly, for example, impose a *permanent* restriction

on home visitors as this simply would be incompatible with the substance of the rights afforded by Article 40.5 regarding the inviolability of the dwelling and the right of association with relatives, friends and others guaranteed by Article 40.6.1

112. While this ground is perhaps somewhat weaker than in the case of restrictions on outdoor movements, nevertheless for all the reasons I have just mentioned I consider that the applicants should be given leave to seek a declaration that the restrictions on home visits contained in Article 4(2) of the 2020 Regulations are unconstitutional and ultra vires with effect from 1st July 2020.

Conclusions

113. In conclusion, therefore, I would allow the appeal but only to the extent indicated in the body of this judgment.