Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

Gemma O'Doherty and Anor v. The Minister for Health & Ors

On appeal from: [2021] IECA 59

Judgment delivered on 5 July 2022 **[2022] IESC 32**

Headline

The Supreme Court dismissed this appeal, holding that, as a general rule, the absence of expert or technical evidence cannot, in and of itself, be the basis for a refusal of leave to seek judicial review if challenging the validity of legislation. However, where legislation recited circumstances giving rise to the necessity for it, that basis was supported by sworn evidence and the case sought to be made challenged the truth and/or and correctness of the basis upon which the legislation enacted, then evidence was required and had not been adduced. In addition, the Supreme Court rejected the contention that, where an applicant shows that legislative measures interfere with constitutional rights, the burden of justifying such an interference falls onto the State.

Composition of Court

O'Donnell C.J., Irvine P., MacMenamin, O'Malley, Baker, Hogan, Murray JJ.

Judgments

O'Donnell C.J. (with whom Irvine P., MacMenamin, O'Malley, Baker and Murray JJ. agreed); Hogan J. dissenting in part.

Background to the Appeal

The appellants sought leave to bring judicial review of Acts and Regulations passed by the Government in order to combat the spread and severity of the COVID-19 pandemic on the grounds that they were repugnant to the Constitution, particularly the constitutional rights to liberty, free movement and travel (Articles 40.3.1° and 40.4.1°), the inviolability of the dwelling (Article 40.5) and freedom of association (Article 40.6). Specifically, the appellants challenged the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act, 2020 and the Emergency Measures in the Public Interest (COVID-19) Act, 2020. In addition, the appellants challenged the following statutory instruments: S.I. No. 121/2020 – Health Act, 1947 (Section 31A – Temporary Restrictions) (COVID-19) Regulations, 2020 and S.I. No. 128/2020 – Health Act, 1947 (Section 31a – Temporary Restrictions) (COVID-19) (Amendment) Regulations, 2020. Meenan J. refused leave to bring judicial review of these Acts and Regulations, holding that the applicants had failed to meet the threshold for leave as set out in *G. v. DPP* [1994] 1 I.R. 374 because, *inter alia,* the applicants were required to put on affidavit "some facts which, if proven, could support a view". This decision was affirmed by the Court of Appeal. The core question on appeal to this Court concerned whether the appellants should have been granted leave in the first instance. In order to answer this question, this Court, in its determination granting leave to appeal, posed three interrelated questions. Firstly, was expert evidence required to be put forward by the applicants in order for leave to be granted? Secondly, if the Acts and Regulations have an impact on constitutional

rights, does the onus shift to the State to justify that impact? Thirdly and finally, did the Acts and Regulations on their face have such a significant impact upon the constitutional rights of citizens that leave should have been automatically granted?

Reasons for the Judgment

Regarding the first question, O'Donnell C.J. noted that, as it is necessary to establish standing to challenge legislation, it must be shown in any case that the challenged measures affect the challenger's interests. Similarly, in the case of seeking leave to bring judicial review, a plaintiff is required to meet the threshold set out in the case of *G. v. DPP*, and while this is a low threshold, it is not a non-existent one. However, it does not follow from this that more by way of evidence is required – in certain cases, meeting this threshold may even be apparent from the provision in question. O'Donnell C.J. held, citing *Molyneux v. Ireland* [1997] IEHC 206, [1997] 2 I.L.R.M. 241, that if legislation can be defended without evidence and solely based on argument, analysis, inference and logic, the same must hold true for a challenge to the same legislation. Ultimately, he held that, while it may be as a matter of fact that cases are strengthened by evidence, as a matter of law, the absence of expert or technical evidence could not, in and of itself, be the basis for a refusal of leave to seek judicial review if challenging the validity of legislation. **[39-45]**

Regarding the proportionality issue, O'Donnell C.J. examined the question of whether, once it is shown that Acts or Regulations have a significant impact on the constitutional rights of citizens, the burden of justifying such an impact shifts to the State. He noted that the term 'proportionality' does not appear in the text of the Constitution itself, rather the concept was introduced to constitutional analysis by Costello J. in the High Court in *Heaney v. Ireland* [1994] 3 I.R. 593. Proportionality in *Heaney* was used as a tool to analyse legislation and the extent to which it can affect or interfere with rights. O'Donnell C.J. held, however, that simply because the test applied by Costello J. in *Heaney* was drawn from Canadian authority, which itself could be traced back to a decision of the Canadian Supreme Court (*R v. Oakes* [1986] 1 SCR 103) where there exists such an onus on the State, it did not follow that the same approach should apply here. Firstly, he cited two decisions in which the Irish courts had specifically distinguished the Canadian approach from the Irish approach: *P.J. Carroll & Company Ltd v. Minister for Health and Children* [2006] IESC 6, [2006] 3 I.R. 431 and *Fleming v. Ireland* [2013] IESC 19, [2013] 2 I.R. 417. Secondly, he held there are legal, institutional and procedural differences between the jurisdictions of Canada and Ireland that make simply transplanting the Canadian test into the Irish system inappropriate. Thirdly, he held that it was also clear, both from the judgment of Costello J. in *Heaney* and from his extra-judicial writings that it was never his intention to tie Irish law to developments in Canada or any other jurisdiction. Finally, he held that it would seem extremely unlikely given the structure of the Irish Constitution, the presumption of constitutionality and the place of the separation of powers in the Irish system that it was the Canadian model which was intended when the proportionality test was set out in *Heaney*. Consequently, he held that where Acts or Regulations have a significant impact on constitutional rights, it is not the case that the onus of justifying such an impact 'shifts' to the State. **[47-65]**

Having dealt with the issue of proportionality, O'Donnell C.J. considered whether, given the impact the Acts and Regulations had on the appellants' constitutional rights, leave should have been automatically granted. He noted that there was some confusion about what case exactly had been made before the High Court; however, he held that the Court was satisfied that the test applied by the High Court judge required evidence as to the justification for the Acts and Regulations and alleged lack of proportionality for the grant of leave for judicial review. O'Donnell C.J. held, as he outlined in relation to the first question, that this was the incorrect test to apply and that there was no absolute or general rule that expert evidence or evidence in relation to policy must be provided in order to challenge the constitutional validity of legislation. However, he held that the appellants challenge was a challenge to the State's assessment of the public health situation i.e., they claimed that the measures taken were disproportionate because the State overestimated the severity of the pandemic. In these circumstances, in order to succeed, the applicants' case required some plausible evidence in order to establish an arguable case that the State's assessment was beyond any permissible view of the relevant situation. It may have been possible, O'Donnell C.J. noted, to make an arguable case that the State's measures were disproportionate, even accepting its assessment of the severity of the COVID-19 pandemic. Such a case would only have required evidence of impact of the measures on the applicant and thereafter analysis of the measures and the Constitution. However, it was not possible to make an arguable case that the State were completely wrong in this assessment without putting forward some evidence to that effect. In other words, while expert evidence as a general rule is not required in order to secure leave for judicial review, in this particular case an arguable case had not been made, in part because of the lack of evidence to contradict the State's assessment of the pandemic when that was the case being made by the applicants. **[70-83]**

Having addressed the questions relating to evidence and shifting of the onus of proof, O'Donnell C.J. turned to the issue of whether or not the appellants should have been given leave in the first instance. O'Donnell C.J. noted that while the appellants did make reference to a disproportionate interference with the inviolability of the dwelling, freedom of assembly, the practice of religion and the liberty of the citizen, this was a small part of a much broader case advanced by them. The core of their case was the claim that the Acts and Regulations were part of a global conspiracy to undermine the rights of citizens and the administration of justice. In order to make this specific type of claim, he held, some plausible foundation in evidence was required. He held that the High Court was correct to refuse leave for judicial review on that basis and furthermore that it would be inappropriate for leave to be granted on another, alternative basis, as suggested by Hogan J., which would involve making a different case in respect of different provisions applicable at a different time and by reference to circumstances and scientific knowledge which had not been adduced in evidence. To the extent that the appellants' claim made a reference to interference with the right to protest (and free exercise of religion) those references were themselves inadequate to permit leave to be granted to make a case, particularly since such a case, insomuch as it involved an acceptance of the State's assessment of the scientific position, was contrary to the core case advanced by the appellants. **[84-115]**

Hogan J. agreed that evidence is not a necessary condition for the grant of leave for judicial review in a case presenting a constitutional challenge on proportionality grounds, and that the onus of proof did not shift to the State to justify measures once an impact on a constitutionally protected right had been established, but otherwise dissented in part. While he agreed with the majority of the Court that no leave should have been granted in respect of the claim that the Acts and Regulations were unconstitutional on the basis that no real threat was posed by the emergence of COVID-19, he held that there was a second element of the appellants' case on which leave should have been granted. This second element, he held, was predicated on the acceptance of COVID-19 posing a real and grave public health emergency but that the Acts and Regulations were nevertheless disproportionate and unconstitutional **[17]**. He emphasised the far-reaching impact of the Acts and Regulations on core fundamental rights, noting in particular that in the history of the State there has never been a general prohibition on peaceable assembly and public protest, a general restriction on movement and travel, nor general controls on the number of visitors to citizen's houses **[50]**. In light of this, he held that the Acts and Regulations called for the closest judicial scrutiny **[38]**. Consequently, he held that leave should have been granted as a result of the impact of the regulations on a number of constitutional rights and provisions as he was satisfied that the threshold set down in *G. v. DPP* had been met.

First, focusing particularly on the impact of S.I. No. 206 of 2020 on the right to protest, Hogan J. held that the appellants should have been granted leave in circumstances where the Regulations effected a "complete and total ban" on the organisation of or participation in a public protest **[55-89]**. Second, he held that leave should have been granted as a result of the Acts and Regulations disproportionately infringing personal liberty by, for example, confining people to their own homes and stipulating a 2km radius around one's home in which recreational exercise was permitted. In particular, he noted that the Oireachtas should have kept such restrictions under active review as knowledge of the pandemic and how COVID-19 spread developed, and that there was an arguable case that keeping the measures in place after 1 July, 2020 were disproportionate **[90-104]**. Finally, Hogan J. held that it was arguable that the Acts and Regulations infringed the guarantee of the inviolability of the dwelling insofar as they sought to control or regulate the presence of visitors to people's homes. While he noted that this may not have posed a constitutional issue in the short-term, he held that it would not be possible for such a measure to exist in the long-term, and again after 1 July, 2020 **[105-112]**. Consequently, Hogan J. held that limited leave should have been granted in the first instance for the reasons set out in his judgment.

References in square brackets are to paragraphs in the respective judgments of O'Donnell C.J. and Hogan J.

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Case history

15 March 2022	Oral submissions made before the Court
[2021] IESCDET 129	Supreme Court Determination granting leave
[2021] IECA 59	Judgment of the Court of Appeal **(judgment which was the subject of the appeal to the Supreme Court)**
[2020] IEHC 209	Judgment of the High Court