APPROVED **[2023] IEHC 547**

THE HIGH COURT

Record No.: 2022/4706 P

BETWEEN:

GERARD CRAUGHWELL

Plaintiff

-and-

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

Defendants

JUDGMENT of Mr Justice Rory Mulcahy delivered on 12 October 2023

Introduction

1. The application is made in proceedings which the Defendants describe as an invitation to the Court to "*embark upon a review of some of the most sensitive elements of the Government's exercise of the executive power in relation to the external security and external relations of the State*". Given this sensitivity, the Defendants seek to have a number of issues disposed of by way of preliminary trial. This judgment concerns the Defendants' application for an Order pursuant to Order 25, rule 1 and/or Order 34, rule 2 of the Rules of the Superior Courts directing the trial of a preliminary issue.

2. The Plaintiff is an independent member of Seanad Éireann. He had previously been President of the Teachers' Union of Ireland. He had also previously served in the British Army, the Royal Irish Rangers and the Permanent Defence Forces. He serves as a member of the Oireachtas Committee on Transport and Communication, the Foreign Affairs and Defence Committee and the Petitions Committee. In these proceedings, he claims that the Irish Government has entered into an agreement with the United Kingdom Government pursuant to which UK military aircraft are permitted to enter Irish airspace and to intercept and/or interdict aircraft that pose a threat to Ireland and/or the United Kingdom.

3. The Plaintiff claims that the alleged agreement is an international agreement within the meaning of Article 29.5.1° and that the Government has acted in breach of the Constitution by failing to lay it before the Dáil. Article 29.5.1° provides as follows:

> *Every international agreement to which the State becomes a party shall be laid before Dáil Éireann.*

4. In addition, the Plaintiff alleges that the *terms* of the alleged agreement are in breach of various other provisions of the Constitution including Articles 1, 5, 6, 13.4, 13.5.1°, 13.5.2°, 15.6.1°, 15.6.2° and 28.2 thereof.

Procedural History

5. The Plaintiff commenced proceedings by way of Plenary Summons on 12 September 2022. He delivered his Statement of Claim on the same date. The Plaintiff refers in his Statement of Claim to a pre-action letter his solicitors wrote to the Defendants in which they referred to a reply given by the then Taoiseach to a question during a Dáil debate on 16 November 2005. The letter stated that in reply to the question *"Would the RAF have to be called in from either Northern Ireland or Britain to intercept a hijacked aircraft?"*, the Taoiseach replied: *"On the first question, there is co-operation and a pre-agreed understanding on those matters."*

6. The Defendants raise a number of preliminary objections in their Defence. These preliminary objections include pleas to the effect that the exercise by the Government

of the executive power of the State in relation to external security and external relations is justiciable and/or amenable to review before the Courts only in the case of a clear disregard of the provisions of the Constitution, and also to the effect that the Plaintiff has failed to plead any facts suggesting that the first Defendant has acted in clear disregard of the Constitution in exercising its executive power. It is pleaded that the claim is therefore bound to fail. The balance of the Defence is without prejudice to the preliminary objections.

7. At paragraph 9 of the Defence, the Defendants explain that *"[i]t is the policy of the First Named Defendant that it will neither confirm nor deny matters relating to the external security and external relations of the State falling within its exclusive power, in circumstances where such confirmation or denial would risk endangering security and/or undermining the State's international relations."* Accordingly, the Defendants make no admissions in relation to the existence of the alleged agreement and put the Plaintiff on proof of same. Moreover, they deny that the duty to lay an international agreement before the Dáil under Article 29.5.1° of the Constitution has arisen or that the first Defendant has acted in disregard of its powers and duties under the Constitution. The Defendants also expressly deny all of the alleged breaches of the Constitutional provisions pleaded by the Plaintiff.

8. Following the delivery of a Reply to the Defence, the Plaintiff raised particulars on the Defence and sought voluntary discovery by letter dated 22 February 2023. The letter sought, *inter alia*, all documents *"pertaining to any agreement or arrangement made between the Defendants, its servants or agents, and the United Kingdom of Great Britain and Northern Ireland, its servants or agents, which allows, causes, or permits UK military aircraft of the Royal Air Force ("the RAF") to enter Irish airspace."*

The Application

9. By Motion dated 27 March 2023, the Defendants issued the within application seeking an Order directing a preliminary trial of two issues set out in a Schedule to the Motion. These were:

(1) Is the exercise of the Government's executive power in relation to the external security and external relations of the State justiciable and/or otherwise amenable to review by this Court in the absence of any material facts being pleaded capable of establishing clear disregard of the Constitution?

(2) Is the exercise of the Government's executive power in relation to the external security and external relations of the State justiciable and/or otherwise amenable to review by this Court in circumstances where the proceedings would require this Court to review matters of external security falling within the scope of the executive power, confirmation or denial of which could risk endangering the security of the State and undermining the State's international relations.

10. As explained below, the first issue identified was subject to some refinement during the course of the application.

11. The motion was grounded on an affidavit of Ms Sonja Hyland, Deputy Secretary General (Global Issues), Political Director in the Department of Foreign Affairs. Her affidavit addresses the need for confidentiality in the exercise by the executive of its functions in relation to external security and external relations, and explains that the policy of neither confirming nor denying certain matters arises from the necessity for such confidentiality. It is a policy, she avers, used "sparingly". She seeks to justify its invocation in the circumstances of this case by reference to a number of factors including the necessity to maintain the trust of the State's international partners.

12. She avers that the Plaintiff's claim in relation to the existence of the alleged agreement is based on a single fact, the response from the Taoiseach in 2005 referred to above. The Defendants' position is that this is not a sufficient factual basis to ground the Plaintiff's claim. Ms Hyland describes the Plaintiff's claim as entirely speculative.

13. The Plaintiff filed a replying affidavit in which he opposed the Defendants' application. The affidavit explained certain aspects of the management and control of Irish airspace. He refers to an alleged incident in 2020, reported in *The Irish Times*, during which RAF jets were launched to intercept Russian aircraft in "Irish airspace". He also refers to a question which he caused to be asked in the House of Commons

about the British Government's policy on the RAF entering Irish airspace "*for operational purposes*". The response from the Minister for the Armed Forces was that the *"Department's policy is that UK military aircraft do not enter the sovereign airspace of Ireland for operational purposes, without the express prior agreement of the Irish Government. Questions on sovereign airspace access and associated regulations are for individual nations to answer, therefore any questions on Irish airspace should be directed to the Irish government."* The Plaintiff cites this, together with the Taoiseach's statement in 2005, as "*strongly indicative*" that an agreement of the type alleged by him in the proceedings exists.

14. The Plaintiff takes issue with the merits of the policy of neither confirming nor denying certain matters and the manner in which he believes the State manages its external security arrangements. He complains about the inadequacy of Oireachtas oversight mechanisms and avers that he is *"seeking clarity in order that the Oireachtas can make an informed decision and engage in meaningful oversight."* He makes clear that his intention is not to affect detrimentally the security of Ireland and avers that he would not object to the matter being heard *in camera* or other security procedures being imposed by the Court to allay the Defendants' "*security concerns"*.

15. Ms Hyland filed a replying affidavit in which she clarified that the incident reported in *The Irish Times* had occurred in international airspace over which Ireland had certain air traffic control responsibilities, not in Irish sovereign airspace. She avers that the response of the Minister for the Armed Forces to the parliamentary question relied on by the Plaintiff is consistent with the position of successive Irish governments and reflects the requirements of Article 3 of the Air Navigation (Foreign Military Aircraft) Order 1952, which prohibits foreign military aircraft flying over the State save on the express invitation or with the express permission of the Minister for Foreign Affairs. The Plaintiff in oral submissions argued that his concern related to interception and interdiction and not 'overflights'.

Arguments

16. The parties are agreed that the principles by which the question of whether it is appropriate to direct a preliminary trial should be decided are as set out by the Supreme

Court in **Campion v South Tipperary County Council [2015] IESC 79; [2015] 1 IR 716**:

*"**[35]** The following therefore is a summary of the legal position before O. 25 of the Rules of the Superior Courts can be successfully invoked:-*

- *there cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application;*
- *there must exist a question of law which is discrete and which can be distilled from the factual matrix as presented;*
- *there must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be will not be sufficient;*
- *the greater the impact which a decision on the preliminary issue(s) is likely to have on the entire case, the stronger will be the argument for making the requested order;*
- *conversely if irrespective of the court's decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order;*
- *exceptionally however, even if the follow on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense;*
- *as an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate;*
- *it must be 'convenient' to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful to retain the traditional separation of such matters;*

- *'convenience' therefore should be understood as meaning that the process will enhance in an overall way the most efficient, timely and cost effective method of disposing of the entire litigation;*
- *the making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties;*
- *the court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally*
- *subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to so do."*

17. The Defendants rely, in addition, on the Supreme Court's decision in **LM v Commissioner of An Garda Siochana [2015] IESC 81; [2015] 2 IR 45** and, in particular, the observations of O'Donnell J (as he then was) at paragraph 33:

> *"**[33]** There are, therefore, in my view, circumstances in which justice may well require the trial of a preliminary issue. It is unrealistic not to recognise that much, if not all, substantial litigation is brought against parties which have the resources to meet any award of damages. It is also not uncommon for plaintiffs in such claims to be unable to discharge any award of costs from their own resources. Discovery, although available to all parties, will often bear more heavily on defendants against whom allegations are made than on the party making the allegation. Where a claim is extensive, and is brought by a plaintiff not able to satisfy any award of costs, and where discovery and consequent preparation of evidence is extensive and costly, the economic and commercial logic of settling such claims may become pressing. Discovery in particular is intrusive, and litigants who are subject to the process are understandably doubtful that any information disclosed can be limited to its immediate recipients and used only for the purpose of the litigation. They may also anticipate a hearing where sensitive matters will be focused on and ventilated. Again, this increases the pressure on a defendant, in particular, to compromise the proceedings. In some cases, particularly where there is some possible substance to a plaintiff's claim, this may be a form of justice, even if rough at times, but in other*

cases the pressure to settle caused simply by the length and scope of the proceedings, the breadth of the claim, the cost (financial and otherwise) of making discovery and the absence of any possibility of early determination may be perceived as something less than justice. In such cases, the trial of a preliminary issue may be entirely appropriate and indeed required. In other cases, the trial of a preliminary issue may simply be a sensible course for all parties."

* emphasis added

18. As pointed out by the Defendants in their submissions, the focus of this application is whether to try a preliminary issue, not the merits of the issues which the Defendants are seeking to have addressed as preliminary issues, still less the merits of the underlying proceedings. Some understanding of the arguments that the parties wish to advance is, however, essential, for the purpose of determining the appropriateness of trying preliminary issues.

19. The Plaintiff does not allege any breach of fundamental rights under the Constitution. He argues, however, that where there is a clear Constitutional provision which imposes a limitation on executive power, then the question of whether the executive has acted within that limitation is reviewable by the Courts. He argues that Article 29.5.1° is such a provision and therefore the question of whether the executive has complied with the provisions of Article 29.5.1° is amenable to review by the Courts. None of the other Constitutional provisions invoked were identified as imposing 'clear' limitations on the exercise of executive power, but he maintains that the Courts are entitled to review whether the executive has complied with those Constitutional provisions, albeit that a different threshold for review may apply.

20. The Defendants contend that the exercise of the executive power of the State in relation to external security and external relations is not justiciable save in cases of "clear disregard" of the Constitution, and that the Plaintiff's claim does not disclose any basis for alleging such clear disregard.

21. Both parties refer to seminal cases on the separation of powers and review by the Courts of executive action including **Boland v An Taoiseach [1974] 1 IR 388** and **Crotty v An Taoiseach [1987] IR 713**. In addition, they refer to the more recent

decisions in **Burke v Minister for Education and Skills [2022] IESC 1; [2022] 1 ILRM 73** and **Costello v Government of Ireland [2022] IESC 44**, though both sides agree that none of those cases deal with the question of executive action in the field of external security in circumstances where the necessity for confidentiality is said to be in issue.

22. As this is merely an application to try a preliminary issue, for present purposes it suffices to say that the extent to which the issues raised by the Plaintiff are justiciable at all is clearly an issue which will have to be addressed in the context of these proceedings.

23. The Defendants argue that both issues which they seek to have tried go to the question of justiciability, which they contend is a question particularly suited for trying as a preliminary issue. They argue that the matters raised by the Plaintiff are more appropriately pursued in the political arena.

24. The first preliminary issue proposed is premised on the Defendants' contention that the Plaintiff's case is based on little more than bare assertion – that there is an agreement – unsupported by any material facts. The reference to 'material facts' in the preliminary issue proposed derives from Order 19, Rule 3 of the Rules of the Superior Courts:

> *Every pleading shall contain and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively.*

25. The Defendants draw an analogy with the requirements in relation to pleading fraud – while acknowledging that there are particular Rules of the Superior Courts (Order 19, Rule 5(2)), relevant to the pleading of a claim in fraud – and reference the decision of Clarke J (as he then was) in **National Educational Welfare Board v Ryan [2008] 2 IR 816**. That judgment concerned an application to strike out a claim of fraud as having been inadequately pleaded. The Court identified the following principles:

> *"**[12]** 4.7 A balance between these two competing considerations needs to be struck. The balance must be struck on a case by case basis but having regard to the*

following principles. Firstly, no latitude should be given to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged that the fraud took place and what the consequences of the alleged fraud are said to be. Where, however, a party, in its pleadings, specifies, in sufficient, albeit general, terms the nature of the fraud contended together with specifying the alleged consequences thereof, and establishes a prima facie case to that effect, then such a party should not be required, prior to defence and, thus, prior to being able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contended for, and establishes a prima facie case to that effect, the defendant should be required to put in his defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case, and then pursue more detailed particulars prior to trial."

26. The Defendants argue that just as the seriousness of a claim in fraud, and the adverse consequence for a defendant of such a claim being advanced, imposes an increased burden on a plaintiff to plead the claim with specificity, a claim of the type being pursued by the Plaintiff here also carries with it a heightened onus to do more than plead a bare assertion. The first issue proposed suggests that the threshold for justiciability is pleading sufficient material facts to be capable of establishing clear disregard of the Constitution.

27. The Defendants' counsel fairly accepted that the second question posed proposed a "*far reaching theory of non-justiciability*" wherever review by the Courts could, of itself, risk endangering the security of the State or undermining the State's international relations.

28. In addition to the inherent appropriateness of addressing justiciability as a preliminary issue, the Defendants argue, by reference to **Campion**, that there are four key ingredients present here which make the trial of a preliminary issue appropriate in this case. They argue that the issues are defined with sufficient precision; that the factual basis for the trial of the preliminary issues is not disputed; that the trial of the preliminary issue would save time and costs and substantially dispose of the proceedings; and that

there are particular features of this case – the security considerations – which make the trial of a preliminary issue particularly appropriate.

29. Insofar as the Defendants contend that there are no material facts in dispute, the Defendants argued at hearing that there could be no dispute as to what had been pleaded and they wished to argue that the Plaintiff had not pleaded a sufficient case to engage the Court's jurisdiction to review executive action. As the first question was also premised on the proposition that the threshold for review was in clear disregard of the Constitution, they argued that if this was in dispute, the preliminary issues as proposed could be reframed to reflect this.

30. The Defendants say that if the questions posed in the preliminary issues are answered in the way they contend for, *i.e.* that the Plaintiff's claim is not justiciable, then there will be a clear saving in time and costs. Even if the answers to the preliminary issues only narrow or clarify the scope of the proceedings, that itself may have potential benefits. Conversely, the justiciability issue will, the Defendants say, have to be addressed in the proceedings at some point, and there will be no significantly increased costs by addressing them as a preliminary issue.

31. They place significant emphasis on the sensitivity of the underlying issues and rely on the *dicta* of O'Donnell J in **LM** as supporting their contention that the sensitivity of the subject matter of the proceedings is a factor to weigh in the balance in determining the merits of trying a preliminary issue. The Defendants reference, by way of example, the Plaintiff's request for discovery as giving rise to significant concerns in relation to the State's necessity to keep confidential its external security arrangements. The possibility of circumventing those concerns by dealing with these proceedings in advance of discovery is said to be a factor to which the Court should have regard.

32. The Plaintiff objects to the trial of the preliminary issues proposed by the Defendants. He refers to McKechnie J's observation in **Campion** (at p. 727) that:

> *"[It] remains the position that, at primary level, a unitary trial is the starting point. Experience throughout many decades of litigation has shown that in the vast majority of cases this is the best mechanism by which justiciable issues can be*

determined, not only so as to achieve justice, but also as representing the most expeditious and cost effective way of doing so."

33. The Plaintiff did not dispute, however, that the hearing of the action in the ordinary way could give rise to security concerns and he made constructive suggestions for means of addressing those concerns. In addition to his suggestion on affidavit that he would not object to the matter being heard *in camera*, his written submissions referred to the Supreme Court decision in **Gilchrist v Sunday Newspapers Ltd [2017] IESC 18; [2017] 2 IR 284**. In **Gilchrist**, an application was made to have defamation proceedings taken by officers of the State's witness protection programme heard *in camera* in circumstances where it was contended that a hearing in public could put the lives of such officers at risk. Reliance was also placed on the State's interest in maintaining the secrecy of the witness protection programme. The Supreme Court concluded that the case *could* be heard *in camera*:

*"**[46]** However, the net issue presented for determination by this court can be reduced to the question whether this trial* must *be conducted fully in public, or whether* any *departure from that principle may be permitted. In my view, the public interest in the functioning of the witness protection programme and the consequent protection of the lives of participants in it and officers and staff mean that the court's power to control its own powers must extend to departing from a hearing in public in this case at least to some extent."*

The Court went on to identify relevant principles which would apply to a consideration of whether an *in camera* hearing was warranted.

34. In addition, counsel for the Plaintiff indicated in oral submissions that the Plaintiff would be open to considering a modular trial as a means of trying to mitigate any security concerns that the hearing of the case might cause.

35. The Plaintiff's objection was largely focussed on the Defendants' assertion that there were no material facts in dispute between the parties. The Plaintiff contended that he had pleaded sufficient material facts to entitle him to pursue his claim. Insofar as the Defendants' proposed preliminary issue was premised on the proposition that there were

no such material facts, this was not accepted and therefore, argued the Plaintiff, the key ingredient for trying a preliminary issue, agreed facts, was not present. Moreover, he argued that the Defendants couldn't rely on any default of pleading which was occasioned by its own policy of not denying or confirming the existence of the alleged agreement. He argued that insofar as that policy was relied on by the Defendants in their pleading, it was an impermissible plea and that they "*should not be allowed to profit from their own breach of the rules*".

36. In addition to disputing the Defendants' claim that there was no dispute regarding whether sufficient material facts had been pleaded, the Plaintiff also disputed the Defendants' contention that the relevant threshold for justiciability of executive action where fundamental rights are not engaged is "clear disregard" of the Constitution, at least insofar as Article 29.5.1° was concerned.

37. He did not raise specific arguments in relation to a lack of precision in the way that the issues had been framed or seriously dispute that the answers to the issues posed could lead to a saving in costs by either resolving the proceedings or by narrowing the issues between the parties.

38. In the course of their reply, the Defendants suggested re-wording the first of the preliminary issues. A revised proposal in the following terms was suggested:

> *(1) Is the exercise of the Government's executive power in relation to the external security and external relations of the State justiciable and/or otherwise amenable to review by this Court on the basis of the facts as pleaded?*

Discussion

39. In **Campion**, McKechnie J gave the following warning to a Court addressing the question of whether to try a preliminary issue (at paragraph 40):

> *"**[40]** Before embarking on these matters however, it should be stated that in an application such as this, it is important for the court not to express any real opinion on the merits of the substantive action, or even on how the causes of action or the reliefs therein claimed, have been formulated or structured. Such, should be*

avoided for obvious reasons as well as being quite evidently premature, given the fact that no trial court as yet, has inquired into such matters or offered any concluded view thereon. However, and notwithstanding this constraint, some reference to the dispute quite evidently is required so as to put the issues for consideration, into an understandable context."

40. Although the parties did engage in some perhaps inevitable discussion of the merits of the proceedings in the course of the application, the Supreme Court's warning seems to me to have particular force on this application given, not only the weighty constitutional issues it potentially raises and the fact that the very jurisdiction of the Court to hear and determine the claim has been put in issue, but also having regard to the sensitivities identified by Ms Hyland in her affidavits, which sensitivities are fairly acknowledged by the Plaintiff. In such circumstances, it behoves the Court to proceed with caution.

41. In my view, the sensitivities identified by Ms Hyland are a critical factor in determining whether it is appropriate to try a preliminary issue. In **Gilchrist**, the Supreme Court concluded that the public interests at issue in that case were capable of justifying a departure from the fundamental constitutional value of administration of justice in public. Given the sensitivity of the issues here, they must equally be capable of supporting an argument that the trial of a preliminary issue is in the interests of justice if that mechanism is capable of avoiding the security risks identified.

42. In this case, the Defendants assert that it is necessary, in the exercise of their executive functions in relation to external security, to adopt a policy of neither confirming nor denying the existence of the alleged agreement. The merits of that position do not fall for consideration on this application, but if there is a mechanism which avoids requiring the Defendants to undermine that policy in the very process of trying to defend it, then it seems to me that the interests of justice require the Court to seek to facilitate such a mechanism as long as that does not do an injustice to the Plaintiff, for instance, by ensuring that it remains open to him to challenge the Defendants' reliance on the policy in these proceedings.

43. Of course, the issues proposed still have to be appropriate for determination by way of preliminary issue having regard to the principles in **Campion** and I accept the Plaintiff's contention that the "starting point" is a unitary trial. However, I am satisfied that the first issue, as reformulated, is appropriate for determination by way of preliminary issue.

44. The question is framed with sufficient precision to be capable of a clear answer. Though couched in terms of justiciability, it raises the question of whether, having regard to the particular subject matter of these proceedings, the Plaintiff's pleadings disclose a cause of action at all. That is a proposition that a defendant is always entitled to test and it seems to me that if the Defendants wish to test that proposition by way of trying a preliminary issue, no injustice would be done to the Plaintiff as long as he is not placed in a worse position than if faced with an application to strike out his claim. He could not, therefore, be deprived of relying on arguments that might be available to him in such an application (see, for instance, **Lopes v Minister for Justice, Equality and Law Reform [2014] IESC 21; [2014] 2 IR 301**).

45. As reframed, the first issue no longer rests on disputed matters – whether there are material facts pleaded – and now turns on the question of whether the pleadings, the terms of which cannot be disputed, give rise to a cause of action. The parties dispute whether the relevant threshold for judicial intervention in the executive function is "clear disregard" by the executive of the Constitution. The Defendants say that that is a question of law which can be dealt with by way of preliminary issue. Insofar as it may prove necessary for a Court to address it in order to answer the preliminary issues raised, I am satisfied that that is so. Of course, that does not mean that the question of whether that threshold has been met does not turn on the particular facts of any given case. Given the variety of Constitutional provisions invoked by the Plaintiff, it may be that different thresholds apply depending on the breach alleged.

46. Insofar as the Defendants contend that the Plaintiff's claim is not justiciable, I agree that that is a matter more susceptible to be suitable for determination as a preliminary issue than other legal issues.

47. Resolution of the first issue does have the potential to lead to savings in time and costs. It has the potential to be determinative of some aspects of the proceedings even

if not determinative of them all; the answers to the question may be different depending on the provision of the Constitution alleged to be engaged. Justiciability is an issue which will have to be dealt with in the course of the proceedings in any event, although there is a risk that a full trial of the preliminary issue will not be decisive in resolving *any* aspect of the proceedings and thus such a procedure might only serve to increase costs and delay the final resolution of the proceedings. However, the decisive consideration, in my view, is that it *may* allow the legal issues to be determined without trespassing on the sensitive security issues said to be engaged in a full defence of these proceedings.

48. The Plaintiff very fairly did not object to the reframing of the first question, while maintaining his opposition to the trial of a preliminary issue. Insofar as he argues that any deficiency in his pleading – which he denies – is caused by the Defendants' policy of not confirming or denying the existence of the alleged agreement and cannot be relied on to defeat his claim, it seems to me that that does not render it unjust to direct the trial of a preliminary issue; as pointed out by the Defendants, that is an argument which he can advance at the trial of the preliminary issue. Similarly, his argument that the Defendants' reliance on that policy is not in accordance with the rules on pleading can be addressed at the trial of the preliminary issue.

49. As noted, the Plaintiff indicated a willingness to consider a modular trial. **Campion** specifically identifies such a mechanism as being more suitable than a trial of a preliminary issue in some circumstances. At this stage, I am satisfied that the trial of a preliminary issue is the appropriate next step to take. If it does not resolve the proceedings or proves incapable of so doing, then the question of modularisation, or other measures to address the peculiar sensitivities of these proceedings, can be re-visited.

50. The second issue sought to be tried encompasses a very broad proposition to which the answer may not be a clear 'yes' or 'no' and appears to encompass a very wide range of potential factual scenarios. Despite its scope, the Defendants argue that there are no material facts in dispute in relation to the issue. As indicated earlier, the Plaintiff has engaged constructively with the Defendants' concerns about security and has not disputed that the case could involve the review by a Court of matters the confirmation

or denial of which *could* risk endangering the security of the State and undermining the State's international relations. Of course, he disputes that the confirmation or denial of the alleged agreement *would* risk endangering the security of the State or undermining its international relations, but the Defendants have deliberately identified "could" as the threshold for the preliminary issue in order to side-step any such dispute.

51. Notwithstanding the acceptance of that fact – that confirmation or denial of the agreement *could* risk giving rise to security concerns – it seems to me that the second issue as currently formulated is not based on sufficient agreed facts to be appropriate for determination by way of preliminary issue. In **LM**, the Supreme Court concluded that the very importance of the legal issue arising was a factor which rendered it inappropriate for determination by way of preliminary issue. Given the weighty constitutional issues at play in these proceedings, and the far-reaching scope of the second issue proposed, similar considerations arise here. As the case law referred to by both parties suggests, the circumstances in which executive action is susceptible to review by the Courts on the basis that it breaches the Constitution is not a simple question of law and must be determined by reference to the particular factual circumstances, and the particular Constitutional provisions, at play. A preliminary trial with no agreed facts, even if agreed only for the purpose of trying a preliminary issue, other than the possibility of endangering the security of the State or undermining the State's international relations in some indeterminate way is not, in my view, a satisfactory way to address so far-reaching a proposition.

Conclusion

52. In those circumstances, I propose granting an Order pursuant to Order 25, Rule 1 of the Superior Courts directing the trial of the first preliminary issue set out in the Schedule to the Notice of Motion subject to the amendment identified at paragraph 38 above. The parties may wish to agree or propose further refinements to either of the issues in light of this judgment. I will list the matter for mention on a date convenient to the parties for the purpose of finalising the Order and, if required, making Directions.