AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2021:000050

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

Between/

GEMMA O'DOHERTY AND JOHN WATERS

Applicants

-and-

THE MINISTER FOR HEALTH, IRELAND AND THE ATTORNEY GENERAL

Respondents

-and-

DÁIL ÉIREANN, SEANAD ÉIREANN AND AN CEANN COMHAIRLE

Notice Parties

Judgment of Mr. Justice O'Donnell, Chief Justice, delivered on the 5th of July, 2022.

Background

1. On 30 January, 2020, the World Health Organisation ("WHO") reconvened its Emergency Committee. It advised that the recent outbreak of Covid-19 constituted a Public Health Emergency of International Concern. On 11 March, 2020, Covid-19 was declared a pandemic by the World Health Organisation ("WHO"). By this point the WHO reported that there were more than 118,000 cases in 114 countries and 4,291 people had lost their lives.

2. On the 12 March, 2022, following the spread of Covid-19 to Ireland, An Taoiseach announced that the country would go into 'lockdown' until 29 March. This resulted in the closing of schools, colleges, childcare facilities and cultural institutions. Limitations on indoor and outdoor gatherings were advised and businesses were urged to implement public health advice on social distancing. This was to be the first iteration of what would become many lockdown measures.

3. As the pandemic progressed, legislative measures were implemented with the avowed object of limiting its impact in Ireland. Two core pieces of legislation were enacted:-

(i) Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act, 2020 ("the Health Act, 2020"); and

(ii) Emergency Measures in the Public Interest (COVID-19) Act, 2020 ("the Emergency Measures Act, 2020").

The former Act effected amendments to the Social Welfare Act, 2005 and the Health Act, 1947 (the "1947 Act"). Its long title gives some sense of the extraordinary nature of the legislation and the events which gave rise to it:-

"An Act, to make exceptional provision, in the public interest and having regard to the manifest and grave risk to human life and public health posed by the spread of the disease known as Covid-19 and in order to mitigate, where practicable, the effect of the spread of the disease known as Covid-19, to amend the Health Act 1947 to confer a power on the Minister for Health to make regulations prohibiting or restricting the holding of certain events or access to certain premises and to provide for enforcement measures; to provide for powers for certain medical officers of health to order, in certain circumstances, the detention of persons who are suspected to be potential sources of infection with the disease known as Covid-19 and to provide for enforcement measures in that regard; and to confer on the Minister for Health the power to designate areas as areas of infection of Covid-19 and to provide for related matters; to amend and extend the Social Welfare Acts to provide for amendments in relation to entitlement to illness benefit for persons who have been diagnosed with, or are a probable source of infection with the disease known as Covid-19; and to provide for amendments in relation to jobseeker's benefit and jobseeker's allowance to mitigate the economic effects of the spread of the disease known as Covid-19; and to provide for related matters."

4. The Act amended the 1947 Act. In particular, a new section 31A was inserted conferring a power on the Minister to make regulations for preventing or limiting the spread of Covid-19. Again, the significance of what was permitted is evident from the sheer breadth of the provision. Accordingly, it is necessary to set out in full:-

> "31A. (1) The Minister may, having regard to the immediate, exceptional and manifest risk posed to human life and public health by the spread of Covid-19 and to the matters specified in subsection (2), make regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19 (including the spread outside the State) or where otherwise necessary, to deal with public health risks arising from the spread of

Covid-19 and, without prejudice to the generality of the foregoing, such regulations may, in particular, provide for all or any of the following:

(a) restrictions to be imposed upon travel to or from the State;

(b) restrictions to be imposed upon travel to, from or within geographical locations to which an affected areas order applies;

(c) without prejudice to the generality of paragraph (b), restrictions to be imposed upon persons or classes of persons resident in, working in or visiting locations referred to in paragraph (b) including (but not limited to)—

(i) requiring persons to remain in their homes, or

(ii) without prejudice to any other provisions of this Act or regulations made thereunder requiring persons to remain in such other places, as may be specified by the Minister;

(d) the prohibition of events, or classes of events, including (but not limited to) events—

(i) which, by virtue of the nature, format, location or environment of the event concerned or the arrangements for, or the activities involved in, or the numbers likely to be attending, the event could reasonably be considered to pose a risk of infection with Covid-19 to persons attending the event,

(ii) at specified geographical locations to which an affected areas order applies,

(iii) at locations which by virtue of the nature, format, or environment of the locations concerned or the arrangements for, or the activities involved in, or the numbers likely to be attending the type of events at the locations, could reasonably be considered to pose a risk of infection with Covid-19 to persons attending at events at those locations,

(iv) where the level of proposed attendance or likely level of attendance at the event could reasonably be considered to pose a risk of infection with Covid-19 to persons attending the event;

(e) the safeguards required to be put in place by event organisers in relation to events in order to prevent, limit, minimise or slow the risk of persons attending any such event of being infected with Covid-19;

(f) the safeguards required to be put in place by owners or occupiers of a premises or a class of premises (including the temporary closure of such premises) in order to prevent, limit, minimise or slow the risk of persons attending such premises of being infected with Covid-19;

(g) the safeguards required to be put in place by owners or occupiers of any other place or class of place, (including the temporary closure of such place or class of place) in order to prevent, limit, minimise or slow the risk of persons attending at such place or class of place of being infected with Covid-19;

(h) without prejudice to the generality of the foregoing paragraphs, the safeguards required to be put in place by managers (howsoever described) of schools, including language schools, creches or other childcare facilities, universities or other educational facilities (including the temporary closure of such facilities) to prevent, minimise, limit, or slow the risk of infection of persons attending such premises of being infected with Covid-19;

(i) any other measures that the Minister considers necessary in order to prevent, limit, minimise or slow the spread of Covid-19;

(j) the giving of notices, the particulars to be contained therein and the manner in which such notices may be given for the purposes of the Regulations;

(k) such additional, incidental, consequential or supplemental matters as the Minister considers necessary or expedient for the purposes of giving full effect to the Regulations.

(2) When making regulations under subsection (1), the Minister—

(a) shall have regard to the following:

(i) the fact that a national emergency has arisen of such character that there is an immediate and manifest risk to human life and public health as a consequence of which it is expedient in the public interest that extraordinary measures should be taken to safeguard human life and public health;

(ii) the fact that a declaration of Public Health Emergency of International Concern was made by the World Health Organisation in respect of Covid-19 and that Covid-19 was duly declared by that Organisation to be a pandemic;

(iii) the fact that Covid-19 poses significant risks to human life and public health by virtue of its potential for incidence of mortality;

(iv) the policies and objectives of the Government to take such protective measures as are practicable to vindicate the life and bodily integrity of citizens against a public health risk;

(v) the need to act expeditiously in order to prevent, limit, minimise or slow the spread of Covid-19;

(vi) the resources of the health services, including the number of health care workers available at a given time, the capacity of the workers to undertake measures, to test persons for Covid-19 and to provide care and treatment to persons infected with Covid-19, the necessity to take such measures as are appropriate to protect health care workers from infection from Covid-19, and the capacity of hospitals or other institutions to accommodate and facilitate the provision of care and treatment to infected persons;

(vii) the resources, including the financial resources, of the State;

(viii) the advice of the Chief Medical Officer of the Department of Health,

and

(b) may, have regard to any relevant guidance (including, in particular, any guidance relating to the risk assessment for, and case definition relating to, Covid-19) provided by

the World Health Organisation, the European Centre for Disease Prevention and Control, the Health Protection Surveillance Centre of the Health Service Executive and other persons with relevant medical and scientific expertise.

(3) Before making regulations under subsection (1), the Minister—

(a) shall consult any other Minister of the Government as he or she considers appropriate having regard to the functions of that other Minister of the Government, and

(b) may consult any other person as the Minister considers appropriate for the purposes of these regulations.

(4) The Minister may, having consulted any other Minister of the Government as he or she considers appropriate having regard to the functions of that other Minister of the Government, exempt specified classes of persons including, but not limited to persons, who perform essential services, including statutory duties or other specified public or other services, from regulations under subsection (1).

(5) This section is without prejudice to the provisions of section 31, including as they may relate to Covid-19.

(6) A person who—

(a) contravenes a provision of a regulation made under subsection (1) that is stated to be a penal provision,

(b) obstructs, interferes with or impedes a relevant person in the course of exercising a power conferred by regulations under this section on that relevant person,

(c) fails or refuses to give to a relevant person information—

(i) that is within the first-mentioned person's knowledge,

(ii) that the first-mentioned person is required by regulations under this section to give the relevant person, and

(iii) that the first-mentioned person has been requested to give, or has been otherwise informed of the requirement to give, to a relevant person,

or

(d) in purported compliance with a requirement under regulations under subsection (1), gives information to a relevant person that, to the first-mentioned person's knowledge, is false or misleading in any material particular,

shall be guilty of an offence.

(7) A member of the Garda Síochána who suspects, with reasonable cause, that a person is contravening or has contravened a provision of a regulation made under subsection (1) that is stated to be a penal provision, may, for the purposes of ensuring compliance with the regulation, direct the person to take such steps as the member considers necessary to comply with the provision.

(8) (a) A person who, without lawful authority or reasonable excuse, fails to comply with a direction under subsection (7) shall be guilty of an offence.

(b) A member of the Garda Síochána may arrest without warrant a person whom the member has reasonable cause for believing is committing or has committed an offence under this subsection.

(9) A member of the Garda Síochána who has reasonable grounds for believing that a person is committing or has committed an offence under this section may require the person to state his or her name and address.

(10) A person who fails or refuses to state his or her name and address in compliance with a requirement under subsection (9), or who, in purported compliance with such a requirement, states a name or address that is false or misleading, shall be guilty of an offence.

(11) A member of the Garda Síochána may arrest without warrant any person whom the member has reasonable cause for believing has committed an offence under subsection (10).

(12) A person who commits an offence under this section is liable on summary conviction to a class C fine, or to imprisonment for a term not exceeding 6 months, or both.

(13) (a) Regulations under subsection (1) may provide for their implementation and enforcement by a person (in this section referred to as a 'relevant person'), or group of such relevant persons, as may be specified, and for this purpose different persons, or combinations of persons, may be so specified for different purposes in, or in relation to different provisions of, such regulations.

(b) Without prejudice to the generality of paragraph (a), persons who may be specified under this subsection include—

(i) an authorised officer,

(ii) a medical officer of health,

(iii) an officer of the Minister for Justice and Equality,

(iv) an officer of customs (within the meaning of the Customs Act 2015), or

(v) a person, or group of persons, appointed by the Health Service Executive.

(14) Without prejudice to the generality of section 95, a relevant person may, in the course of exercising a power or performing a function conferred on that officer by regulations under subsection (1), require a member of the Garda Síochána to assist in the exercise of the power or the performance of the function, including by way of temporarily detaining any person, bringing a person to any place, breaking open of any premises, or any other action in which the use of force may be necessary and is lawful, and any member of the Garda Síochána so required shall comply with the requirement.

(15) (a) Where an offence under this section is committed by a body corporate and it is proved that the offence was committed with the consent or connivance, or was attributable to any wilful neglect, of a person who was a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, that person shall, as well as the body corporate, be guilty of an offence and may be proceeded against and punished as if he or she were guilty of the first-mentioned offence.

(b) Where the affairs of a body corporate are managed by its members, paragraph (a) shall apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director or manager of the body corporate.

(16) In this section, section 31B and section 38A—

'event' means a gathering of persons, whether the gathering is for cultural, entertainment, recreational, sporting, commercial, work, social, community, educational, religious or other reasons, and includes but is not limited to a gathering which is required to be subject to a consent, licence or other form of permission granted in relation to it by any Minister of the Government or public body pursuant to any enactment or rule of law which provides for the regulation of proper planning and sustainable development, traffic management, sale of alcohol, safety and health at work or otherwise;

'event organiser', in relation to an event, means a person who—

(a) Is engaged in publicising, arranging, organising or managing the event, or

(b) receives some or all of the revenue, where applicable, from the event;

'premises' includes a building or any part of a building, any outdoor space surrounding or adjacent to the premises, whether or not used in conjunction with the premises, any land, premises, tent, caravan, or other temporary or moveable structure, ship or other vessel, aircraft, railway carriage or other vehicle (whether stationary or otherwise) and any storage container.

(17) In this section, section 31B and section 38A—

'Covid-19' means a disease caused by infection with the virus SARS-CoV-2 and specified as an infectious disease in accordance with Regulation 6 of, and the Schedule to, the Infectious Diseases Regulations 1981 (S.I. No. 390 of 1981) or any variant of the disease so specified as an infectious disease in those Regulations; 'European Centre for Disease Prevention and Control' means the Agency established under the provisions of Regulation (EC) No. 851/20041 of the European Parliament and of the Council of 21 April 2004 establishing a European centre for disease prevention and control."

5. In summary, these provisions provided for the making of regulations permitting detention and isolation of persons in order to limit the spread of Covid-19 and restrictions on travel to and within the State. In addition, certain events were prohibited and the owners of certain premises

were required to implement certain safeguards. Subsection 6 made it an offence to fail to comply with the Regulations and certain Garda powers in relation to the Regulations were also set out.

6. The Emergency Measures Act, 2020, made changes to the Residential Tenancies Act, 2004, and the Mental Health Act, 2001. Part 2 of the Act made changes affecting the ability of landlords to terminate tenancies, evict tenants and increase the rent. Part 5 of the Act provided for changes to the Mental Health Tribunal when it could not be constituted in the usual way "due to the exigencies of the public health emergency".

7. In addition, a number of statutory instruments were made pursuant to the powers conferred by, *inter alia*, Section 31A of the Health Act, 1947 as amended: 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. S.I. No.121/2020 (which I will refer to as "the Regulations" and which are central to these proceedings) provided for restrictions on people leaving their homes and hosting or participating in events. In addition, it set out the essential services that could be kept open during the lockdown periods. One representative provision is a regulation providing for restriction of persons to their homes and for exceptions for certain persons and activities:-

> "**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."

8. A further important provision was that limiting or restricting events. Article 5 of the Regulations provides:-

"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."

9. The Regulations were to have effect between 8 and 12 April, 2020. S.I. No. 128/2020 extended these regulations to 5 May, 2020. There was a further S.I.: S.I. No. 153/2020 – Health Act, 1947 (Section 31A – Temporary Restrictions) (COVID-19) (Amendment) (No. 2) Regulations, 2020, which extended the Regulations to 18 May, 2020.

10. The political backdrop to the implementation of the Acts and the Regulations was also relevant to the submissions made in the High Court and Court of Appeal. Following the general election of 8 February, 2020, the newly elected Dáil, on 20 February, 2020, failed to elect a new Taoiseach. Under the provisions of Article 28.11.1°, the Taoiseach having resigned, the members of the Government are deemed also to have resigned, but the Taoiseach and other members of the Government continue to carry on their duties until their successors are appointed.

11. The applicants sought leave to bring judicial review, seeking an order of *certiorari* nullifying the Health Act, 2020, the Emergency Act, 2020, and Statutory Instruments 121/2020 and 128/2020. Meenan J. refused leave to bring judicial review for the reasons set out in his written judgment ([2020] IEHC 209) and the Court of Appeal subsequently dismissed an appeal against this decision: [2021] IECA 59. The applicants were granted leave to appeal to this Court on one specific ground on 23 November, 2021: [2021] IESCDET 129. That ground, set out at paragraph 22 below, while phrased as three interrelated questions, addressed the issue as to how the standard for the grant of leave to seek judicial review is applied when measures, which on their face are enacted in response to a public health issue of general importance, and which measures undoubtedly interfere with constitutional rights in a direct and significant way, and where the applicants do not themselves adduce evidence suggesting that the measures are disproportionate.

The High Court

12. The applicants' initial application for judicial review had two main components. Firstly, the applicants contended that the legislation and measures outlined above were repugnant to various provisions of the Constitution. Secondly, the applicants contended that this legislation had not been validly enacted in the first instance. In addition, in the course of the hearing before the High Court, the applicants also claimed that the limit on the number of members of the public that could attend the hearing was contrary to the provisions of Article 34.1 of the Constitution requiring that justice be administered in public.

The claim of unconstitutionality

13. The applicants claimed that the amendments to the 1947 Act referenced above were "repugnant ab initio to the provisions of the Constitution" and were "wholly disproportionate to the incidence and effects of COVID-19". Similar language was used in respect of the amendments to the Mental Health Act, 2001 and the Residential Tenancies Act, 2004. The applicants contended that the various Acts and Regulations were in breach of Articles 40, 41, 44.2 and 45 of the Constitution respectively. Furthermore, the applicants submitted that the legislative provisions were contrary to various articles of the European Convention on Human Rights and the EU Charter of Fundamental Rights.

14. Meenan J. held that the applicants had not demonstrated a sufficient interest or *locus standi* to challenge the measures insofar as they amended the Residential Tenancies Act, 2004, and the Mental Health Act, 2001. He further held that the applicants did have standing to challenge the other measures introduced, but applying the principles outlined in *G. v. DPP* [1994] 1 I.R. 374 ("*G. v. DPP*") , they had not made out an arguable case that the measures were unconstitutional. He held that no case had been made that the amendments to the 1947 Act were contrary to

Article 41 nor Article 45. Regarding the personal rights of the citizen, Meenan J. held at paragraph 54 of his judgment that such rights are not absolute, and in order to show that the restrictions and limitations of these rights are "disproportionate", it was necessary that the applicants put on affidavit "some facts which, if proven, could support such a view". Specifically, Meenan J. noted that "unsubstantiated opinions" were not a substitute for facts. Instead, he held, the applicants had sought to question the accuracy of the figures and science underlying the respondents' submissions setting out the background and reasons for the legislation in question without themselves tendering evidence in rebuttal.

15. In addition, he held that the applicants had not made out an arguable case that the measures were "directly repugnant" to the European Convention on Human Rights and/or the Charter of Fundamental Rights and/or EU law, given these instruments do not have direct effect in respect of the impugned provisions . Finally, Meenan J. rejected the claim that the need to have hearings remotely due to the Covid-19 pandemic was contrary to the provisions of Article 34.1 of the Constitution mandating the administration of justice in public. Firstly, he noted, it was always the case that not every member of the public who wished to attend in court could do so because of the physical restraint of the size of the courtroom. Secondly, he held that members of the media who wished to report on the proceedings were facilitated and furthermore, the applicants could be furnished with a copy of the transcript of the hearings without the usual charge.

Legislative process

16. The applicants challenged a number of aspects of the legislative process by which the Acts and Regulations were enacted and promulgated. Firstly, they claimed that the first named respondent, in making regulations under the statute in question, was acting unconstitutionally. Meenan J. rejected this argument, holding that delegated legislation is permissible under the

Constitution and no case was made by the applicants that the Regulations were outside the principles and policies contained in the enabling statute.

17. Secondly, the appellants maintained that the passage of the legislation through the Houses of the Oireachtas was unconstitutional as a result of the political backdrop I have already described. Meenan J. rejected this argument also, holding that such matters are not justiciable as they concern the internal procedures of the Dáil. Furthermore, he held that what is described as a "caretaker government" is clearly provided for in Article 28.11.1°.

The Court of Appeal

18. The appellants appealed to the Court of Appeal (Birmingham P.; Edwards and Costello JJ.). It delivered judgment on 2 March, 2021, dismissing all grounds of appeal. Regarding the appellants' contentions concerning the alleged disproportionate interference with rights, Birmingham P. reiterated the approach of Meenan J. in holding that the aforementioned contentions did not meet the *G. v. DPP* threshold. The arguments regarding the passage of the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Bill through Dáil Éireann and the procedures followed in the Oireachtas were similarly rejected, as were the arguments regarding the requirement that justice be administered in public.

19. Two new issue arose for consideration by the Court of Appeal: the procedure followed by the appellants and a claim of objective bias in the High Court proceedings.

Procedure followed

20. Birmingham P. noted that in the High Court there had been an issue as to whether or not the applicants had followed the correct procedure by seeking to have legislation declared unconstitutional by way of application for judicial review rather than by way of plenary

proceedings. He further remarked that Meenan J. accepted these submissions and reached the conclusion that, had the applicants established an arguable case, the correct course of action would be to order the proceedings to continue as if they had been begun by plenary summons. Birmingham P. agreed and held that had the applicants accepted the inappropriateness of proceeding by way of judicial review and the desirability of proceeding by way of plenary proceedings, they would have avoided having to surmount the leave stage.

Objective bias

21. The applicants contended that, because counsel for the respondent in the High Court and Meenan J. were previously both members of a team providing legal services to a public inquiry into the banking crisis of 2008, this generated an issue of objective bias. In applying the test of the reasonable bystander, Birmingham P. held that there was no basis for a claim of objective bias.

Issue on Appeal

22. The appellants then sought leave to appeal to the Supreme Court. Leave was granted in a determination dated 23 November, 2021 ([2021] IESCDET 129). The Court considered that no arguable case had been established in respect of the Residential Tenancies Act, 2004, the Mental Health Act, 2001 or any claim in respect of the right to earn a livelihood. The sole ground on which leave was granted was stated at paragraph 20 of the determination and is as follows:-

> "Should leave to apply for judicial review have been granted in circumstances where the applicants had failed to lay any evidential foundation by way of reports or affidavits from scientific or medical experts regarding the proportionality of the Measures (other than those amending the Residential Tenancies Act 2004 and the Mental Health Act 2001 and

those alleged to impact the livelihood of the applicants) so far as they concern in particular the constitutional rights to liberty, free movement and travel (Article 40.3.1 and Article 40.4.1); the inviolability of the dwelling (Article 40.5) and freedom of association (Article 40.6)? In particular, are the Measures on their face of such clear and significant impact upon the constitutional rights of every citizen that if their validity is challenged in judicial review proceedings leave to seek judicial review should be granted? If so, does the evidential burden shift to the parties denying invalidity to demonstrate the necessity and proportionality of the Measures even if the applicants have not advanced any evidence (scientific, medical or technical) of direct impact upon any person?"

The appellants made several submissions directed to this issue.

Onus of proof

23. The appellants contended that, where elements of rights contained within the Constitution are being infringed, the onus must be on the party responsible for the effect on the right to provide adequate justification for that infringement. Specifically, in their Application for Leave to Appeal, they noted: "the inappropriate imposition on the Appellants of the burden of proof regarding the proportionality of measures which by virtue of their exceptionality, scale and scope were prima facie ultra vires the Constitution and ought to have been treated as such by both the High Court and Court of Appeal". They submitted that the placing of the onus of proof in this matter should operate in a manner analogous to the *habeas corpus* procedure enshrined in Article 40.4.2° whereby on a complaint of unlawful detention, the High Court must "forthwith enquire into the said complaint". Having identified the constitutional provisions at issue and (they argued) having established an interference with their constitutional rights, they argued that to also require them to show why the Government measures were not justified would

be inconsistent with the constitutional order for which they contended. The appellants further said that the threshold for obtaining leave was incorrectly applied by the High Court and Court of Appeal respectively. It was their contention that all that was required to secure leave was to show *prima facie* unconstitutionality rather than being required to demonstrate the objective disproportionality of the measures – in other words, they claim that they have an "automatic *locus standi*". They stated that the specific rights that are involved are those contained in Articles 40-44.

24. The respondents submitted that it was their reading of the determination of this Court that the question of whether the evidential burden shifts to the respondents only arises if the Court determines that the fact of an interference with rights is sufficient to justify a grant of leave. They submitted that in this case, the appellants have failed to demonstrate the fact of such interference. The respondents contended that every legislative or administrative measure has the potential to interfere with peoples' rights but that this alone is insufficient to shift the burden to the State to justify the measure – rather, they argued, the applicants must "at a minimum" make a stateable case "based on some evidence" as to why a given justification for a legislative or administrative measure fails the relevant constitutional test.

25. Furthermore, the respondents rejected the argument that a lower burden of proof should apply to applications for judicial review where the applicants seek to challenge measures impinging on constitutional rights. They argued that this would create several difficulties, including the potential of a multiplicity of approaches applying within a single set of proceedings and elongating the leave stage process. In addition, they argued that this would represent a departure from the principle of the presumption of constitutionality. The respondents noted that while the applicants are seeking *certiorari* of the aforementioned legislation, this is, in effect, seeking a

declaration of unconstitutionality. Consequently, the presumption of constitutionality must arise, and it is this presumption that places the burden of proof on the applicants. In addition, they noted that the particular burden in judicial review proceedings is a consequence of the applicants' choice to adopt judicial review rather than plenary proceedings.

Arguability Threshold/Proportionality

26. The appellants contended that they had met the threshold for leave for judicial review as articulated in *G v. DPP*, which requires that the applicant establish "a stateable case, an arguable case in law". They emphasised that the leave stage for judicial review is to act as a "screening process" in order to prevent trivial or unstateable cases proceeding and that a court's function, at this stage, is not to express any view on whether the grounds put forward are strong or weak once that threshold has been met. The appellants argued that their case does not fall into any of these categories and thus, in refusing to grant leave, the High Court and Court of Appeal conflated the requirements at the leave and substantive stages of the hearing. Consequently, they argued that the case presented at the leave stage of the proceedings was more than enough to meet the threshold in *G. v. DPP*.

27. The respondents rejected this contention. They submitted that the simple fact that the legislative Acts and Regulations "undoubtedly interfere" with constitutional rights does not, in and of itself, justify the grant of leave. While the respondents agreed that the measures impacted in a "direct and very significant way" on Irish people, they contended that it is still necessary for a claimant to provide some basic details about how and why a claim is being brought – i.e., it is not enough simply to claim they are unconstitutional in order for leave to be granted. Specifically, they pointed to a lack of detail on the appellants' part regarding how and why certain constitutional provisions rendered the Acts and Regulations invalid other than asserting

that this was the case. They submitted that the Court was not provided with sufficient particulars to understand why the appellants claimed the measures were unconstitutional and this is why their claim fails to meet the *G. v. DPP* threshold.

28. Furthermore, the respondents contended that the trial judge, in response to claims advanced by the applicants that the pandemic was based on "fraudulent science", was correct in remarking that no medical or scientific evidence had been adduced to support such a claim. That, they said, did not involve an assessment of the overall proportionality of the measures. Rather, they argued, it was an assessment of the preliminary argument that the social problem to which the measures were directed was "fraudulent".

29. The respondents agreed that *G. v. DPP* is the appropriate threshold to apply in this case but disagreed with the appellants' claim that they have surmounted it. They argued that the threshold is not whether an arguable case could be made that a measure is unlawful, but whether, on the facts and pleadings of these proceedings, an arguable case has, in fact, been made. It is the respondents' contention that this threshold has not been met.

Additional Submissions

30. The appellants reiterated their submissions regarding the legitimacy of the legislative process by which the measures were introduced. A further challenge to the Acts and Regulations rests on the appellants' understanding of the Government's decision-making process. Finally, the appellants challenged the assertion that they had produced "no scientific evidence", claiming that they had in fact produced such evidence. As these issues do not relate to the issue on which leave to appeal to this Court was granted, as specified in the determination issued by this Court, I do not propose to address them further.

31. The respondents made a submission regarding the choice made by the applicants to pursue their challenge by way of application for judicial review rather than by way of plenary proceedings. While this raises an issue of more general importance, it was not suggested by the respondents that, even if it were determined that the proceedings ought not to have been commenced by a judicial review, such a conclusion would be fatal to these proceedings.

32. It is important to recall that the only issue in respect of which leave to appeal to this Court was granted relates to the question of the grant of leave to seek judicial review in circumstances where it is alleged that the Acts and Regulations are a disproportionate interference with the rights of the appellants in circumstances where no scientific or medical evidence was adduced by the appellants. This can be reduced to three questions:-

(i) Must scientific or medical or other expert evidence be adduced to obtain leave to seek judicial review where it is alleged that statutory provisions are a disproportionate interference with constitutional rights?;

(ii) Does the onus of proof (regarding proportionality) shift to the State if it is established that there has been an interference with constitutional rights?; and

(iii) Even if evidence is generally necessary, are there cases where the impact on constitutional rights is so immediate and significant that leave should be granted, even if no such evidence is adduced?;

33. These three issues raise a basic question about the place of evidence in a challenge to the constitutional validity of legislation, and more particularly where the claim made is that the measure or measures in question lacks proportionality. It will be convenient to discuss the general issue of the place of evidence in constitutional challenges before addressing the specific

questions posed and, in the light of the answers, considering whether or not leave to seek judicial review ought to have been granted in this case.

34. However, at the outset it is useful to clear aside some preliminary issues upon which there is little, if any, disagreement. The first such issue concerns the manner in which these proceedings were taken. It is, as the respondents point out, somewhat of an irony that the specific issue upon which the applicants have failed in both the High Court and Court of Appeal, that is whether they had surmounted the admittedly low threshold set by *G. v. DPP*, is one which arose only because they chose the route of seeking leave for judicial review and which would not have arisen if they had taken the course, suggested by some of the authorities to be the more appropriate one, of commencing plenary proceedings: see e.g. *Riordan v. An Taoiseach (No.2)* [1999] 4 I.R. 343.

35. Since 1986 and the transformation of stateside procedures into the judicial review process, it has been possible to seek declarations and injunctions in addition to the traditional prerogative writs. But that does not mean that *any* claim in which a litigant seeks an injunction, whether mandatory or prohibitory, or a declaration, can be brought by judicial review. Instead O. 84, r. 18(2) permits relief by way of declaration or injunction to be granted, if the Court considers that, having regard to:-

> (a) the nature of the matters in respect of which relief may be granted by order of *mandamus*, prohibition, *certiorari*, or *quo warranto*;
>
> (b) the nature of the persons and bodies against whom relief may be granted by way of such order; and

(c) in all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

36. This power clearly confers a discretion on the Court to permit a claim for a declaration or injunction with which discretion must, however, be exercised judicially and by reference to the criteria set out in O.84, r.18(2). This indicates that it would be appropriate to grant such a remedy in what can be described, broadly, as public law proceedings and, normally, when relief in the nature of the historic prerogative writs might be claimed. While the Court retains a general discretion, it will normally be the case that a challenge to the constitutionality of legislation should only be commenced in judicial review proceedings where it is a necessary part to a challenge of an order or decision which is sought to be quashed, or in respect of which the remedies of *mandamus* or prohibition, or similar remedies, for the exercise (or non-exercise) of public law powers, duties, or functions, might be sought.

37. As the respondents pointed out, this is consistent not just with the terms of Order 84 but also with the underlying constitutional theory that a legislative act was not considered amenable to the prerogative writs. It is also consistent with some broader considerations. Proceedings seeking a declaration that an Act of the Oireachtas is invalid having regard to the provisions of the Constitution are not simply a re-run of political or policy arguments using different language in a different forum. An order of the Superior Courts, to whom the power of review of constitutionality of legislation is reserved by Article 34.3.2°, declaring invalid an Act of the Oireachtas enacted by the representatives of the people in the belief that it was in the public interest, and often in circumstances where the measure may operate beneficially in the case of the majority of the population, is a significant step. In the words of Henchy J. in *State (Woods) v. Attorney General* [1969] I.R. 385, the decision of the Court "unmakes what was put forth as

a law by the legislature but, unlike the legislature, [the Court] cannot enact a law in its place". If the power to strike down legislation was used indiscriminately "it would tend to upset the structure of government". Irish law does not permit challenges to legislation in the abstract (apart from the special circumstances of a reference under Article 26 of the Constitution), nor does it encourage the practice adopted in other jurisdictions where plaintiffs are sought by advertisement to advance an argument with the evidence carefully curated to permit that argument to be made. Under our system, if a court is to be invited to exercise the power to declare invalid an Act of the Oireachtas at the suit of a single private individual, it must be something positively required in the determination of a real claim made by a real person who considers that they have suffered a wrong by virtue of the operation of the legislation or measure. The reality of such a claim is that a piece of legislation enacted, perhaps in the general interest, can be struck down because of its effect on an individual litigant. It is normally appropriate, and certainly desirable therefore, that the Court should hear the evidence of that person, see the witnesses, and furthermore see their evidence tested, in order to determine whether there is in reality such an interference with the rights of the plaintiff as requires this striking down of legislation. Claims are rarely as clear-cut as they might appear in a textbook and the exploration of the nuances of a case is important in determining both the decision and, where appropriate, the precise remedy.

38. The High Court judge came to the conclusion that these proceedings ought to have been commenced by plenary summons. I am not sure this was correct in this case since there was a challenge not just to primary legislation but also to Statutory Instruments and claims of invalidity of such instruments have proceeded by way of judicial review – see e.g. *State (Lynch) v Cooney* [1982] I.R. 337. However, on any view, the trial judge was correct to consider that

this issue was not, in any event, a fatal one. First, it is clear that no rigid rule has been laid down in this respect: *Riordan (No 2)*. Furthermore, and again correctly in my view, he took the view that since under O.84, r.27(5) the Court could order the proceedings to continue as if being done by plenary summons, it would not be appropriate to refuse leave on that ground. It is necessary, therefore, to address the question which, in any event, might arise at a later stage if the proceedings had been commenced by plenary summons, and determine what it is that a plaintiff or applicant must establish to challenge the validity of legislation. This is a somewhat frustrating undertaking since it is rare that the minimum will be sufficient in any contested case. Nevertheless, there may be some broader analytic value in considering the question at this level, and, in any event, it is the issue which must be determined in this case.

39. The second issue relates to the current test for leave to seek judicial review. It is clear that the threshold of arguability in *G. v. DPP* is a relatively low bar, but, as Birmingham P. said in the Court of Appeal, it is not a non-existent threshold. It is worth recalling in this context the observation of Charleton J. in the course of his judgment in *Esmé v. Minister for Justice and Law Reform* [2015] IESC 26 (Unreported, Supreme Court, Clarke, Laffoy and Charleton JJ., 19th March, 2015):-

> "any issue of law can be argued: but that is not the test. The point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of rational preliminary analysis, ultimately have a prospect of success".

The threshold is a familiar one in the law. It is, in essence, the same test which arises when proceedings are sought to be struck out on the grounds that they are bound to fail, or the test that is normally required in order to seek an interlocutory injunction. It must be a case that has a prospect of success (otherwise it would not be an arguable case) but does not require more

than that. While, inevitably, individual judges may differ on the application of the test in individual cases at the margins, the test itself is clear. This test – it must be stressed – is solely one of arguability: it is emphatically not a test framed by reference to whether a case enjoys a *reasonable* prospect of success, still less a *likelihood* of success. Any such language obscures the nature of the test and may on occasion lead to misunderstanding, appeal and consequent delay.

40. It is also well established, and now provided for by the terms of O. 84, r. 24(1), that a court may direct that an application for leave to seek judicial review be heard on notice to the respondent. This permits a respondent to put evidence before the Court and to advance argument. However, it must also be taken as established that this procedure does not alter the threshold test, and which remains that set out in *G. v. DPP*. (See the observations of Denham J. in *D.C. v. DPP* [2005] IESC 77, [2005] 4 I.R. 281). The question remains, therefore, whether an arguable case has been established. But moreover, and importantly, that decision must now be made in the light of the evidence submitted by a respondent, and the arguments adduced. It may also be observed in passing that O. 84, r. 24(2) permits a form of telescoped hearing where the application for leave is treated as the application for judicial review, which may be a useful procedure in urgent cases.

41. In these proceedings, the applicants represented themselves and have prepared extensive pleadings and submissions. This Court, on granting leave to appeal, invited the applicants to avail of the *ad hoc* scheme set up by the Law Society and Bar Council at the suggestion of the Court, under which solicitors and counsel make their services available to unrepresented litigants on a *pro bono* basis in those cases where leave to appeal to the Supreme Court has been granted. This is an admirable system and reflects the fact that leave is only granted in cases

where the appeal contains a point of law of general public importance or in the interests of justice. It is regrettable that the applicants in this case did not avail of that facility, and that no party with any broader interest sought to intervene, as the issues raised in this case are undoubtedly significant and would have benefitted from informed detailed and closely reasoned legal argument. For example, the members of the Court are aware of a considerable body of literature bearing on the question of proportionality and the place of evidence in that regard, but which has not been the subject of argument, discussion or analysis in the context of this case. It should be said that, in this regard, the applicants prepared detailed pleadings and submissions, which showed considerable research and application of thought and that the second named applicant, who carried the burden of making oral argument in this court, did so with courtesy and evident engagement with some of the broader issues and background. Nevertheless, the case was hampered, to some extent, by the fact that it had been commenced by wide-ranging claims and supported, sometimes, by more polemical argument.

42. Finally, it is important to remember that while this appeal addresses a relatively discrete issue of law, the High Court and Court of Appeal were faced with a much more wide-ranging case raising a large number of issues, and that the passages in the judgments of both courts dealing with the issues, which have now been the subject of considerable attention in this Court, must be understood in that context. It is inevitable that, when an issue is singled out like this and is the subject of an appeal to this Court, it may be subject to a more fine-grained analysis than was possible when it was addressed as only part of a case which was both wide-ranging and addressed in the course of sometimes contentious hearings. The fundamental issue for this Court is not the detail of the analysis or the language used in the courts below but whether the High Court and Court of Appeal were correct to refuse leave to seek judicial review of the measures

in respect of which the applicants had standing to challenge on the basis that no evidence had been adduced to support the claim that the measures were disproportionate.

The place of evidence in constitutional challenges

43. Since it is necessary to establish standing to challenge legislation, it must be shown in any case that the measures in question affect the plaintiffs' interests so that it can be argued that the legislation interferes impermissibly with the plaintiffs' constitutional rights. To that extent, it is necessary that it be either proved or admitted that the measures in question have an impact upon the plaintiffs. However, in many cases this may be a purely formal matter, as it may be apparent from the provision in question, or may be admitted in the pleadings, that the measure has such an impact. There will also be constitutional challenges in which issues of fact arise independently of standing. A relatively narrow range of cases may predicate a claim of constitutional violation on a proposition of fact. *Ryan v. Attorney General* [1965] I.R. 294 ("*Ryan*") is a particularly striking example. There, the plaintiff claimed that the fluoridation of drinking water *inter alia* violated her right to bodily integrity. Whether or not this was so depended on the effect of the introduction of that chemical and, specifically, whether it was likely to have a detrimental effect on those consuming water containing it. That was an issue of fact, but one also dependant on expert evidence.

44. But apart from these situations it has not been the case, at least as a matter of history, that more by way of evidence addressing what might be described as the substance of the challenge, or the policy and objectives of the measure in question is required, or still less essential. It was relatively commonplace for constitutional actions to proceed with a reference to the pleadings, with at most formal proof and thereafter legal argument. The matter was viewed from the other end of the lens in *Molyneux v. Ireland* [1997] IEHC 206, [1997] 2 I.L.R.M. 241 where a plaintiff

sought to claim that the power of arrest conferred by s. 28 of the Dublin Police Act, 1842, was a breach of the Article 40.1 guarantee of equality before the law on the basis that the same power of arrest did not exist outside the Dublin area where different powers of arrest were then provided for by the provisions of the Petty Sessions Ireland Act, 1851. No evidence was adduced by the State defendant to explain or justify the distinction made in the Victorian legislation. The plaintiffs sought to rely on this absence of evidence. Costello P., however, found that this was permissible:-

> "It is not necessary for the court to search the parliamentary debates to ascertain the arguments used to justify the enactment of the measure – it will usually be possible for the court to make reasonable inferences from the provisions of the statute itself and the facts of the case."

45. If legislation can be defended without evidence and solely on the basis of argument, analysis, inference, and logic, the same must hold true for a challenge to the same legislation. Indeed, in some cases courts have refused to hear evidence proffered by one or other party. For example, even though there is, at some points, an overlap between constitutional theory (particularly in relation to fundamental rights) and moral philosophy, the courts have refused to hear evidence from philosophers on the basis that it is not relevant to the issue of law which the Court has to determine. In the Supreme Court decision of *F(T) v. Ireland* [1995] 1 I.R. 321, [1995] 2 I.L.R.M. 321, concerning a challenge to the constitutionality of the Judicial Separation and Family Law Reform Act, 1989, Hamilton C.J. cited the approach of Murphy J. in the High Court on this issue. The trial judge had declined to admit in evidence the testimony of a Catholic theologian as to the essential features of a Christian marriage on the basis that:-

> "It may well be that 'marriage' as referred to in our Constitution derives from the Christian concept of marriage. However, whatever its origin, the obligations of the State and the rights of parties in relation to marriage are now contained in the Constitution and our laws, and as Mr. Justice Walsh says it falls to me as a Judge of the High Court to interpret these provisions and it is not permissible for me to abdicate that function to any expert, however distinguished."

As a general rule, consequently, it cannot be said that expert evidence as to the merits or substance of a provision is an essential feature of a constitutional challenge.

46. Having said this, it is of course a matter for individual plaintiffs and their advisers as to how a case may be best advanced, and it may be felt that cases are strengthened by evidence, however limited or tangential, but as a matter of law, it seems clear that it was not usually necessary to adduce evidence to establish the invalidity (or conversely, the validity) of any legislation, once standing and impact upon the plaintiff have been established. It follows that the absence of expert or technical evidence could not, in itself, be the basis for a refusal of leave to seek judicial review if challenging the validity of legislation, where such proceedings are appropriate. The approach of the Court to any such challenge was described in the dissenting judgment of Henchy J. in *Norris v. The Attorney General* [1984] I.R. 36 ("*Norris*") at page 70:-

> "In a case such as the present, where the legal materials we are considering are written instruments (i.e. statutory provisions on the one hand and overriding constitutional provisions on the other), which are not amenable to the judicial development or extension which would be the case in regard to unwritten or case law, we must take those legal materials as we find them. The judicial function in a case such as this is to lay the impugned statutory provisions down beside the invoked constitutional provisions and if,

> in the light of the established or admitted facts, a comparison between the two sets of provisions shows a repugnancy, the statutory provisions must be struck down, either wholly or (if the test of severability laid down in *Maher v. Attorney General* (1973) I.R.140, 147 is applicable) in part".

The essential task of the Court is, it follows, to place the challenged statute against the Constitution as it has been interpreted and by a process of logical analysis and reasoning come to a determination on the validity of the provision. That process may require evidence of the operation or the statute, and the background against which it is to be understood, but it cannot be said that such evidence, and, in particular, evidence as to policy considerations, is an essential element of the task: it is conceivable that the process can be, and often is, performed by argument by reference to certain basic or admitted facts. While focused evidence from persons with experience may assist the Court, it may be important that the proceedings are understood as a contest of ideas and argument rather than as the preserve of rival experts.

47. While Henchy J.'s dissent in *Norris* is now widely cited and approved for its analysis of the constitutional right of privacy, and contains this valuable expression of the judicial task in a challenge to constitutional validity, I should say that I do not necessarily agree with that portion of the judgment which held that, because evidence had been adduced by the plaintiff and none by the State in that case, the Court was *obliged* to enter judgment for the plaintiff. The function of the court in determining the validity of legislation having regard to the provisions of the Constitution is of course a product of the pleadings, the issues and the arguments, all of which are controlled by the parties. However, while in this sense adversarial, the adjudication of the validity of Acts of the Oireachtas is a grave and momentous task affecting a range of interests and persons and cannot and should not be determined solely by reference to which party has the

'best' evidence. In any case, it is, in my view, a question of the degree of relevance and cogency of the evidence, and a court, particularly when considering the validity of a statute, must retain the capacity to assess the evidence adduced, and draw such conclusions from it as it considers appropriate for the determination of the issue before it. However, I consider that it cannot be said that evidence, going beyond proof of impact of the impugned provision on the plaintiff, is usually an essential prerequisite to a constitutional challenge so that a claim which was not supported by such evidence would have to be dismissed on that ground alone.

Proportionality

48. Cases presenting the question of whether an established interference with constitutional rights offend what is now referred to as the principle of proportionality are now common but also present a particular dilemma. In cases of this kind the basis of the challenge is not what might be described as a claim of facial invalidity – that is, that a measure is on its face a clear breach of a constitutional provision – but rather that the measure is a disproportionate interference with the rights of the plaintiff. The focus on the objectives sought to be achieved by the provision and the extent of interference with a constitutionally protected right which this approach entails may suggest that evidence on such matters is necessary.

49. The term proportionality is now so widely used that it is important to remind ourselves that it is not a term used in the Constitution itself. While it might be said that the Constitution does not treat any right as absolute, the statement of rights protected by the Constitution is qualified by terms such as "subject to public order and morality" and "so far as is practicable". Proportionality in this context is best understood, therefore, as a tool for providing some greater level of precision and transparency for the process by which invalid legislative impairments of constitutional rights are differentiated from constitutionally permissible interferences.

50. In *Ryan v. Attorney General,* Kenny J. identified one of the bases on which the courts will interfere with certain legislative decisions as where "there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen". Since then, other cases have referred to justifications for legislative measures in terms that would now be recognised as a form of proportionality analysis (the decision in *Cox v. Ireland* [1999] 2 I.R. 503 is often cited as a proportionality case). However, the use of proportionality as such a tool is generally traced to the judgment of Costello J. in the High Court in *Heaney v. Ireland* [1994] 3 I.R. 593 (*"Heaney")* and extra-judicial writing by the same judge, in an article entitled 'Limiting Rights Constitutionally' in James O'Reilly (ed.), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Round Hall Press 1992), and where, incidentally, the author observed that constitutional actions at that time did not normally involve evidence as to the objectives or policy of the provision challenged.

51. In *Heaney*, Costello J. described proportionality as an approach employed in the European Court of Human Rights ("ECtHR") and also by the Supreme Court of Canada. In an important passage, he said:-

> "In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see, for example Times Newspapers Limited v United Kingdom (1979) 2 EHRR 245) and has recently been formulated by the Supreme Court of Canada in the following terms. The

objectives of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible, and

(c) be such that their effects on rights are proportional to the objective: *Chaulk v R.* [1990] 3 S.C.R. 1303 ("*Chaulk"*) at pages 1335 and 1336."

52. It has been observed that the source of this test in the jurisprudence of the Canadian Supreme Court, on the Charter, can be traced to an earlier case: *R. v. Oakes* [1986] 1 SCR 103 ("*Oakes*"). That case also addressed questions of evidence and procedure and held that, where an interference with rights had been established, the onus shifted to the State to justify the interference by establishing the objective of the provision and by satisfying the three-part test set out. The Statement of Grounds filed by the applicants in this case seems to contend that something similar should apply in this jurisdiction. The question was, therefore, raised in the Court's determination granting leave to appeal, and in its request for clarification this Court drew attention to a number of relatively recent cases in which the issue had been touched upon. In *P.J. Carroll & Company Ltd v. Minister for Health and Children* [2006] IESC 6, [2006] 3 I.R. 431 (*"P.J. Carroll*"), the Court referred to certain Canadian case law, which it did not consider it necessary to rely on, as it considered those cases were "partly determined on foot of

the Canadian Charter of Rights". The Court went a little further in *Fleming v. Ireland* [2013] IESC 19, [2013] 2 I.R. 417 observing that:-

> "an argument was advanced, derived it appears from Canadian jurisprudence, suggesting that the court should approach the question by first determining in general whether a right existed, whereupon the onus shifted to the State to justify by evidence any limitation whatsoever on the general right asserted, by reference to the principle of proportionality […] It should be observed that there is no support in the jurisprudence of this Court for such an approach. Accordingly, this court expressly reserves for a case in which the issue properly and necessarily arises, and is the subject of focussed argument and express decision in the High Court, whether the approach to proportionality urged by the appellant […] is required by, or compatible with, the Constitution."

53. The reference to a right "existing" in this passage was made in a context in which there was there a significant dispute as to the existence of the right contended for, and which, if protected by the Constitution, was undoubtedly interfered with by the challenged provision. In cases where there is no doubt as to the existence of the right, it might be more appropriate to refer to the onus shifting on proof of the interference with, or effect upon, a protected right. However expressed, this has obvious relevance in the present context, since if this approach is correct and appropriate under the Irish Constitution, it would follow that all a plaintiff would necessarily have to do to mount a challenge to the validity of legislation would be to establish an interference with the rights at hand, at which point the onus would shift to the State. It would seem to follow that, in an application for judicial review, a court could not refuse leave on the basis that the plaintiff had not adduced any evidence on the issue of proportionality.

54. The applicants maintained that this Court should adopt the same approach as that which applied by the Canadian courts. The broader argument in favour of such an approach was that it was a logical consequence of the approval here of the Canadian approach to a test of proportionality, and perhaps that of the ECtHR, and was furthermore more protective of fundamental rights and reflective of the relative imbalance of power between parties. Evidence as to the purpose of a statute and a justification for any given measure was, it was said, more likely to be within the possession or power of a State defendant and it is argued that it would be too onerous to impose an obligation on a plaintiff challenging legislation to adduce evidence tending to establish disproportionality, even on a *prima facie* basis, and more consistent with the constitutional structure if the State were to assume the burden of establishing a justification for the interference. To this might be added the fact that the objective of an impairment of rights may not, in fact, be obvious from the legislation enabling it, and that it might be odd to require an applicant to both guess the objective, and then establish that the interference went further than necessary to achieve it.

55. This argument shows very clearly both the benefits and limitations of resort to authorities from other jurisdictions. While it can be very useful to consider how other similar jurisdictions with comparable legal systems and provisions for rights protection have addressed some difficult issues, this requires something more than simply citing similar cases or extracts from such decisions. It is necessary to have some understanding of the legal background against which such decisions were made and the points of similarity with, and important distinction from, the comparable provisions of Irish law and practice. This argument is a good example of why this is so.

56. First, the concepts of evidence and burden of proof are both drawn from the common law and the adversarial system. The significance of the burden of proof in such proceedings is that it provides a structure for determining a case, and therefore, the manner in which a case may proceed. The burden of proof becomes decisive only in a limited number of situations, however: when no evidence is adduced by either party on the issue; where the Court considers that the evidence is equally balanced; or when an application is made at the close of the plaintiff's case that no *prima facie* case has been established. In most cases, however, it would not be necessary to consider where the onus lies in a particular issue, and it is relatively rare that a party would seek to rely on the fact that the onus of proof lay on the other party. In most cases, both parties will seek to adduce evidence on all relevant issues and seek to persuade the courts of the merits of their position on the balance of probabilities. The procedure, however, before the European Court of Human Rights for example, is quite different, and it is difficult to speak of an onus of proof and evidence in that context. In *Ireland v. United Kingdom* (1978) Series A no 25 at paragraph 160 the Court stated:- "[it] will not rely on the concept that the burden of proof is borne by one or other of the [parties]. In cases referred to it, the Court examines all the material before it, whether originating from […] the Parties or other sources, and, if necessary, obtains material proprio motu". The apparent approval, therefore, of the proportionality approach adopted in the jurisprudence of that court in the judgment in *Heaney*, would not, of itself, imply any particular approach to the burden of proof.

57. Second, it seems clear that Costello J. did not seek to tie Irish law to developments in Canada or indeed any other jurisdiction. Indeed, it seems likely from the formulation of proportionality in *Heaney*, and the discussion in his article 'Limiting Rights Constitutionally', that his focus was on the articulation of permissible limitations on rights rather than in formulating a strict

and demanding test for such limitation. While proportionality does provide some analytical structure for determining issues, it would be a mistake to treat it as an almost mathematical formula providing a scientifically measurable and repeatable result wherever and however applied. It is too easily forgotten that different articles of the Constitution contain different limiting provisions, and thus the application of a proportionality test in the case of any given right must take account of the particular constitutional text. There remain wide areas which require judgment, such as the nature of the objectives sought to be pursued, whether it is justifiable, the nature of the restriction, and whether any lesser such restriction would achieve the objective, and most obviously the fundamental test of the proportionality of the measure, which is normally the subject of most contention in the decided cases. That involves judgements on the value to be attributed to the right involved, the assessment of the degree of interference and the value of the objective. None of these matters are capable of objective measurement on a single scale. There remain areas on which decision-makers may reasonably disagree, as indeed exemplified by the fact that the provisions upheld by the Irish courts in *Heaney* were considered to fall foul of the Convention: *Heaney and McGuinness v. Ireland* (2001) 33 E.H.R.R. 12. The reference in *Heaney* to *Chaulk* and, by extension, *Oakes*, cannot be taken, therefore, as endorsing the approach to burden of proof adopted in the latter case.

58. Third, it would strain credulity to contend that the formulation of rights adopted in respect of the Irish Constitution in 1937 and subsequently amended from time to time, nevertheless carried latent within it precisely the same approach to be found in the terms of the Canadian Charter adopted in 1982, as subsequently interpreted by the Canadian Supreme Court. Furthermore, on closer analysis, it is apparent that the approach taken in Canada was not one derived from any principles considered universal, but rather, (as indeed was suggested in the oblique reference in

P.J. Carroll) flowed from the structure of the Charter text and its specific terms. The Charter is a guarantee in a federal system of certain rights identified as fundamental and expressed normally in general terms. Those rights are, however, subject to a limitation provision contained in section 1 of the Charter of Rights and Freedoms which "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by laws can be demonstrably justified in a free and democratic society". It is understandable, therefore, that the Canadian courts would approach Charter issues by considering first whether there is an interference with a right, and then whether the limitation on it can be said to be a reasonable limit prescribed by law and demonstrably justified in a free and democratic society, and to assume that the burden of establishing justification for the interference should lie upon the authority which introduced the measure. However, the structure and language of the Irish Constitution is quite different.

59. Furthermore, even in Canada it does not follow that the burden of proof on all factual issues lies on the State or governmental authority who is responsible for the measure. First, the burden is upon the challenger to establish an infringement of the guaranteed right. As explained in Peter Hogg, *Constitutional Law of Canada* (5th ed, Thomson Carswell 2007) at paragraph 38.4:-

> "In the case of those rights that are qualified by their own terms, for example, by requirements of unreasonableness or arbitrariness, the burden of proving the facts that establish unreasonableness or arbitrariness, or whatever else is part of the definition of the right rests on the person asserting the breach".

Thus it appears there is no blanket rule on the onus of proof in Charter challenges. Indeed, at paragraph 38.5, Hogg observes that other than in those cases just indicated, "in Charter cases, therefore there is no presumption of constitutionality…" citing *Manitoba (A.G.) v. Metropolitan Stores Ltd.* [1987] 1 S.C.R. 110, 121 -125 where the conclusion was justified because of the

innovative and evolutive character of the Charter, and even in those cases where there is room for an onus of proof, the ascertainment of the party on whom the onus lies is determined by the structure and text of the relevant Charter provision.

60. While establishing that there is no blanket rule that once it is established that there is an interference with a right, the burden of showing justification for the interference falls upon the State party, this observation also points to an important, and perhaps fundamental distinction which is also well-explained by Hogg at paragraph 38.3. There is, as he points out, a close relationship between the standard of justification required under s.1 of the Charter and the scope of the guaranteed rights. If a broad interpretation is given to the right, it is inevitable that the standard of justification required will be relaxed. In *Oakes,* the Supreme Court of Canada prescribed a high standard of justification and placed the burden of establishing in on the governmental party. This, in his view, entailed a corresponding caution in determining the breadth of the right. As he observed, it may make little difference in result if the courts opt for a stringent standard of justification coupled with a strict reading of rights, or a relaxed standard of justification with a broad interpretation of rights but "it certainly makes a great deal of difference in the scope of judicial review".

61. It can be said that where the Irish Constitution sets out rights, it does not adopt the approach of stating the rights in unqualified terms and then permitting a general restriction on them. Rather, in most cases, the right is itself defined and qualified in, as I have earlier observed, varying different ways. In terms of the extent of protection that individual rights receive it may matter little whether, for example, the law of defamation is seen as a permissible limitation on a general right of free speech, or conversely, that the right of free speech guaranteed does not extend to matters such as defamation. However, in a context such as the present, the difference may be

significant. If a guarantee of fundamental rights is understood as a statement of the right in absolute terms, then it is likely that the scope of the right protected in such terms will be narrower. Conversely, if rights are stated in terms which contain their own limitation, it is possible that the right may be more broadly stated. Apart from pointing to the desirability of a close and coherent analysis of the Irish Constitution in its own terms, these considerations also underscore the danger of an approach of mix-and-match involved in *ad hoc* adoption of principles from the jurisprudence of other countries.

62. It is also difficult to reconcile the approach of onus shifting with the existing practice of the Irish courts. Inevitably, shifting the onus of proof invites, and perhaps almost requires, that evidence be given to discharge the onus, at least where it is regarded as a matter of proof: in many cases what may be involved is an onus of persuasion. While litigation between private parties can be fairly determined by whatever evidence may be adduced by either party and the view an individual trial judge takes of it subject to limited review by appellant courts consistent with the principles set out in *Hay v. O'Grady* [1992] 1 I.R. 210, the same cannot be said about litigation which has an effect *erga omnes,* and may have the effect of striking down legislation affecting many other people, who were not represented in the proceedings and had no opportunity to comment upon or provide evidence. This problem has led the Canadian courts to treat certain matters as "social facts" and "legislative facts", being the causes and effects of social and economic phenomena. These are in a distinct category, which would allow appellate courts to more easily set aside the conclusions of trial courts in respect of such facts. These matters may be included in the parties' briefs (Hogg, *op.cit* Chapter 60.2). This is, perhaps, a logical consequence of the onus shifting approach, but it sits uneasily with the practice of the courts in all other forms of litigation and tends to blur the distinction between legislative and

judicial decision-making. At the time the Constitution was adopted, consideration was given to establishing a form of Conseil d'État with a broader membership, and not strictly bound by court procedures to perform the function of judicial review of legislation. However, a deliberate choice was made in Article 34 to confer upon the existing court system the power to declare Acts of the Oireachtas unconstitutional. This suggests that the existing court procedures and approach were seen as a positive benefit in adjudicating on constitutional matters. This tends against any approach which would weaken or alter that process and would require a different standard of evidence and of appellate review.

63. Underlying most, if not all, objections to an onus shifting approach is its implications for the separation of powers as hitherto understood in the constitutional scheme. The Oireachtas is not an evidence-gathering, or evidence-led, legislative body. There is no requirement that the Oireachtas obtain or retain evidence or satisfy itself in relation to any particular state of affairs before it enacts provisions in what it considers to be the public interest. Instead, it is entitled to act upon its collective judgement as to the desirability of, or necessity for, legislation. If a court, on whatever judicial standard, can conclude that the judgement of the Oireachtas is not sufficient because of the view a trial judge takes of whatever expert or other evidence has been adduced in a particular piece of litigation controlled by the parties, then that perceptibly shifts the balance between the branches, and suggests that legislation is a two-stage process, where legislation is enacted, and then subject to evidential-based review. There may be good reasons at the level of principle for adopting such a form of check and balance, but it is difficult to maintain that it is the balance adopted by the Irish Constitution.

64. In particular, the presumption of constitutionality has been an accepted part of constitutional jurisprudence since at least *Pigs Marketing Board v. Donnelly* [1939] I.R. 413, the first case in

which a statute was challenged under the new Constitution. It is a presumption said to flow from the separation of powers, and the respect due by the judicial organ to the other organs of state. The presumption is that the law passed by the Oireachtas is presumed constitutional unless and until the contrary is clearly established. It is difficult to understand how an onus shifting approach could be consistent with this presumption and, consequently, this understanding of the separation of powers, which has held sway in this jurisdiction at least and it is notable that as set out above the Canadian courts have come to the conclusion that the logic of the approach to interpretation is that there is no room for a presumption of constitutionality, or Charter compatibility, in Charter cases.

65. The argument, that the presumption operates only insofar as a challenger must show an interference with their right, and that it is at that point, spent, is in my view, unpersuasive. First, this is clearly a very much more limited form of presumption, and one of little practical value, since the major issue in most cases is not the interference with a right but the justification therefor. But the concept of proportionality necessarily implies that it *is* permissible for the State to interfere with rights, if in pursuit of a legitimate objective, and which bears on the protected right no more than is necessary and does so in a manner that is proportional. It is the judgement of the legislature is what is entitled to the presumption that it is constitutional, unless and until the contrary is demonstrated. The apparently innocuous suggestion that the State should bear the burden of proof would, therefore, severely limit, if not remove altogether for all practical purposes, a well-established provision of constitutional jurisprudence.

66. It is said, however, that the shifting of a burden of proof is justified once an interference with protected rights is established, because of a general obligation of fair dealing that should lie on governments dealing with citizens akin, indeed, to the obligation identified in administrative

law to, as it was put, play the game with the cards face up upon the table: see *R. v. Lancashire County Council ex parte Huddleston* [1986] 2 All E.R. 941 and *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 I.R. 63. It is, it is said, appropriate that the executive should establish a factually satisfactory basis for any legislation affecting the rights of citizens. Furthermore, it is said that such an approach is consistent with the principle of peculiar, or at least superior, knowledge. It is argued that the executive is in possession of much more information about the factual and policy considerations that go into any legislation, and it is not desirable that any decision made on the constitutional validity of such a measure should be taken in the absence of potentially relevant information in the possession of the executive. Finally, it is said that, broadly speaking, such an approach is more protective of human and constitutional rights. On this argument, even if it is only in rare cases that the determining factor should be the burden of proof, it is appropriate that the balance in such a case should tilt in favour of the right, once the initial threshold of a demonstrated impact on, and interference with, a protected right, has been met.

67. I am not persuaded by these contentions. First, the suggestion that the executive should disclose evidence in its possession or that it has peculiar or better knowledge of the evidence supporting legislation, assumes the legislative process is one based on evidence, and that evidential material exists that led to the collective judgement being made first at the executive, and subsequently at legislative, level. But while this may be the case, it is certainly not a requirement of the constitutional process. The evidence adduced in any constitutional proceeding may emerge in that context or be collated and prepared for it. It need not exist at the time the legislation was enacted. There is, therefore, no basis for assuming that the state party is necessarily in possession of evidence which it should be obliged to disclose, and accordingly this cannot

provide a justification for shifting the onus of proof. In this regard, there is a significant difference between the constitutional legislative process and an administrative decision which may be challenged in public law. Such a decision may be made in respect of an individual person on material, and subject to the well-developed and stringent requirements of administrative law. Legislation produced by the Oireachtas under the Constitution is an important democratic process which occurs in public, applies to the public generally and where, under the constitutional theory, the people's representatives debate the merits of any particular provision. It follows that, even where there may be papers and documents setting out the views of those involved in preparing the legislation, the constitutionality of any legislation enacted does not depend on the accuracy, correctness or persuasiveness of the views expressed. It depends fundamentally on an assessment of the legislation *vis-à-vis* the Constitution.

68. The argument that the executive has in its possession evidence which it must disclose also raises fundamental issues of the separation of powers between the respective branches of the state. While it is the case in the Westminster model of constitutional democracy that the distinction between the executive and legislative roles is blurred because the executive sits in and largely controls parliament, the distinction is nevertheless important, particularly in the present context. It is the legislature (and not any member of the executive or, still less, any member of the administration) which is subject to the constitutional obligation under Article 15.4 not to enact any law which is in any respect repugnant to the Constitution or any provision thereof, and which, accordingly, is subject to the jurisdiction of the Superior Courts under Article 34.3.2° to consider and determine the validity of any law having regard to the provisions of the Constitution. The views of the minister introducing legislation, still less the views of ministerial advisers, cannot be necessarily attributed to the members of the Oireachtas enacting the

legislation. In *Crilly v. Farrington* [2001] 3 I.R. 251 ("*Crilly v. Farrington*"), this Court reaffirmed the principle that the task of interpreting legislation must be approached by reference to the language used in the enacted statute and rejected the contention that a court was entitled to consider parliamentary debates. The decision of the Court was based, in part, upon considerations relating to the separation of powers, and that it was the collective view of the Oireachtas as expressed in the legislation which it adopted which was to be interpreted. Unless a different approach is to be taken in respect of challenges to the constitutionality of legislation – and that has not been argued in this case – then similar considerations apply in this regard.

69. While the theoretical argument as to the allocation of the onus of proof is an important and difficult one, it is worthwhile placing it in a practical context. I do not consider as a matter of experience or practice, that retaining the principle that he/she who asserts must prove, that legislation is presumed constitutional until the contrary is shown, and that the plaintiff must bear the onus of persuasion in this regard, will have a significant harmful effect on the outcome of cases in real time. In many cases, the difficulty faced may be an abundance of evidence of dubious relevance, rather than the opposite. Where a dispute is capable of being determined by evidence, then both sides will seek to adduce evidence to tilt the balance and parties will rarely be content to rely upon the default position that the other party bears the onus of proof, particularly where it appears likely that the other party will adduce evidence. The procedures of discovery, interrogatories, and notices to admit have all been developed to permit parties to secure evidence from their opponents, and others, to assist in establishing their case, and to avoid difficulties created by any informational asymmetry. These procedures were developed and extended to permit justice to be done and rights to be vindicated in litigation, and there is no reason why they cannot be deployed in the context of a challenge to the constitutional validity

of legislation. If there remain cases where it can be said that little or no evidence has been adduced and the cases are determined on the basis that the plaintiff has not discharged the onus of proof of establishing that legislation is not constitutionally valid, that, in my view, is not inconsistent with the protection of rights. Rather, it is consistent with the operation of a constitutional system in which the decisions of the Oireachtas, particularly on contentious issues of social or economic policy, embodied in acts of public general legislation, made by a democratic process, are entitled to weight unless and until it is demonstrated they are in breach of a specific constitutional guarantee.

70. In this regard, the observations of the late Professor Hogg at chapter 38.4 (*supra*) are particularly instructive. He observed that in *Oakes,* Dixon C.J. had stated that evidence would generally be required to discharge the onus upon the government. Nevertheless, as Hogg observed:-

> "Evidence in Charter cases gives rise to many problems. One is the point already made, that the validity or invalidity of the law will often turn on the state of the evidentiary record at trial. Another problem is cost. A parade of expert witnesses is extremely costly, and this cost is borne not just by the defending government, but also by the challenger, who although not bearing the burden of proof must in all prudence adduce evidence to rebut the government's evidence of justification. For these reasons, in my opinion, it would be desirable for charter review to become less dependent on evidence, even if the courts have to strain somewhat to make "obvious" or "self-evident" findings."

In a footnote, Professor Hogg also notes that the burden of proof is not particularly significant in ordinary litigation. This is because:-

> "In the normal course, each party to litigation tenders all of that party's evidence at the same time. Therefore, a plaintiff challenging a law on Charter grounds will tender all of the plaintiff's evidence before the defendant government tenders any evidence. The plaintiff's evidence will include not only the stage 1 evidence of the Charter breach but also the stage 2 evidence in rebuttal of the anticipated evidence of justification. Since the latter evidence is given before the government had tendered any evidence of justification, some of the advantage of the government's burden of proof is lost."

I agree with these statements. Indeed, not only does experience confirm the validity of the observation that a challenger will normally adduce all relevant evidence, it may also explain why the question of onus shifting has not, before now, arisen for consideration in this Court. In the reality of constitutional litigation, the issue rarely presents itself in any meaningful or practical way. These factors all tend against adopting a blanket rule of onus shifting in Irish constitutional litigation. Accordingly, this is not a consideration which would lead to the reversal of the decisions of the High Court and Court of Appeal in this case. This analysis and conclusion is consistent with the judgment of this Court in *Donnelly & Anor. v. Minister for Social Protection & Ors* [2022] IESC 31.

Did the Applicants' case meet the threshold?

71. Here, however, it is said that the decisions of the High Court and the Court of Appeal were incorrect because those courts concluded that the application failed to meet the *G. v. DPP* standard, on account of the absence of evidence. In this regard, there was a surprising lack of agreement about what had been decided in the High Court. This is, in part, a product of the confusion lying at the heart of many aspects of the case, the sometimes polemical tone in which

it was conducted, and the fact that the issue now raised was not necessarily to the forefront of argument in either the High Court of the Court of Appeal.

72. It will be recalled that the issue upon which this Court granted leave to appeal was whether leave to apply for judicial review ought to have been granted "in circumstances where the applicant had failed to lay any evidential foundation by way of reports or affidavits by scientific or medical experts regarding the proportionality of the measures". It is, perhaps, implicit in this formulation that it was considered that the application had been dismissed because of the absence of evidence, and in particular, evidence from scientific or medical experts. However, the State respondents disavowed any such contention. They relied on Order 84, rule 20(3) of the Rules of the Superior Courts providing that:-

> "It shall not be sufficient for an applicant to give as any of his grounds … an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."

The respondents contended that leave was not refused because the appellants failed to adduce sufficient medical or scientific evidence that disclosed an arguable case as to the disproportionality of the measures. It was argued that leave was refused because they had not identified <u>any</u> factual basis to ground their claim. The problem was not a lack of medical or scientific evidence, it was rather that the Court was not provided with sufficient particulars to understand why the appellants claimed the measures were unconstitutional. This argument was repeated in a number of points, and it was said explicitly that "the State respondents did not contend that the Court should conduct a provisional or preliminary assessment of the

proportionality of the measures on the basis of the evidence, whether scientific or otherwise before it at the time". It was suggested that the comments made in the High Court judgment in this regard were not a provisional assessment of the proportionality of the measures in the light of any scientific or medical evidence, but a rather a conclusion that there were "no facts averred to or pleaded to ground arguable claims of an interference of a constitutional right in the first place".

73. The specific references to "scientific" or "medical" evidence in the High Court judgment were said to refer to the applicants' contentions made in oral submissions that the Covid-19 pandemic was based on "fraudulent science". These references were instead directed towards the appellants' argument that the social problem to which the measures were directed was "fraudulent". This was emphasised in the respondents' replies to the Court's request for clarification. It was said explicitly "there was no obligation on these applicants – or applicants generally – to adduce scientific or expert evidence at the leave stage". It was also stated that "the High Court's reference to the absence of supporting expert evidence was, in the respondents' understanding, to [the] oral submissions described as additional assertions regarding the existence of COVID-19 the purported lack of scientific or medical basis for a public health response and the intentions of various organisations involved in that response".

74. It is apparent that the panel of this Court granting leave understood the High Court judgment as applying either a general principle, or one arising in the context of this case, that evidence as to the justification for the Acts and Regulations and the alleged lack of proportionality was a necessary requirement for the grant of leave in judicial review, and by extension an essential requirement in a plaintiff's case in plenary proceedings. Having re-read the judgment and in the

light of the arguments adduced, I remain of the view that this is how the judgment should be understood.

75. The relevant portions of the judgment are set out at paragraphs 53-56 as follows:-

> "53. … It is clear from the wording of these various Articles that such rights are not absolute and may be restricted. The applicants accept this but maintain that the restrictions and limitation of rights provided for in ss. 31A and 38A are "disproportionate".
>
> 54. To begin 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 view. There was a complete failure by the applicants to do so. The narrative in their "statement required to ground application for judicial review" ended on 16 March 2020 when some 268 cases of Covid-19 and the deaths of two persons were reported. The application for leave was made ex parte four weeks later, on 15 April 2020, without the narrative being updated. The applicants' grounding affidavit was sworn on 5 May with still no update in the narrative. This was, now, some seven weeks after the date on which the applicants had ended their narrative. It is worth noting that on 5/6 May, the Department of Health stated that there were some 22,248 cases of persons having Covid-19 and 1,375 deaths. The applicants made no reference to this.
>
> 55. In their Statement of Grounds and submissions to this Court, the applicants questioned the accuracy of the figures given for the numbers of persons infected with Covid-19 and the number of deaths reported. They went a good deal further and

maintained that the science involved was "fraudulent". Other than their views, the applicants identified no supportive expert opinion either in the Statement of Grounds or grounding affidavit. As opposed to this, the respondents filed an affidavit of Ms. Bernie Ryan, Principal Officer in the Department of Health, which set out, in detail, the background and reasons for the legislation in question. The applicants did not seek to reply to this affidavit.

56. 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".

76. It seems clear that the judgment considered that evidence as to lack of proportionality was necessary, indeed essential:- "[t]o begin 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 could support such a view. There was a complete failure of the applicants to do so". It also seems apparent that such evidence should be in the nature of expert opinion evidence. While there is reference in the judgment to submissions made, the defect identified is in the statement of grounds or grounding affidavit:- "other than their views, the applicants identified no supportive expert opinion either in the statement of grounds or grounding affidavit". Indeed, the respondents now expressly acknowledge that while what the applicants said in their submissions cannot be treated as evidence, the defect in the applicants' case was much more fundamental than that their views were advanced in submissions and not set out on

affidavit. It seems to follow that the critical defect identified by the respondents related to the quality and nature of what was said, rather than when, or how, it was said. Again, it seems to follow from this that expert evidence was considered to be necessary.

77. It is undeniable that the applicants were held to have failed to have met the standard in *G. v. DPP*, and because of an evidential deficit. If, as the respondents now contend, there was no requirement to adduce expert evidence in support of their case, then the question arises: what evidence was required which the applicants failed to adduce? The respondents' contention in this regard is not entirely clear. They accept that the measures in question impact in a direct and very significant way on the Irish people and undoubtedly interfere with constitutional rights. (paragraphs 31 and 32 of the respondents' submissions). However, it is said "at a minimum the applicant would have to point to the alleged justification (e.g. policy statements by government ministers or departments) and make a stateable case based on some evidence as to why the proffered justification failed the constitutional test. This was never done in the present case." (paragraph 44 – submissions, emphasis in original).

78. This formulation, however, raises more questions than it answers. How exactly is a ministerial or departmental statement to be proved by a citizen challenging the legislation, at least consistent with the rules of evidence, even assuming such clear-cut policy statements are available? There are obvious constitutional concerns, to put it at its lowest, in substituting departmental statements of policy for the decisions of the Oireachtas embodied in public general legislation. Where, as is often the case, such ministerial statements of departmental policy are made in the course of debates in the Oireachtas, these concerns can become insuperable objections, at least as the law now stands: *Crilly v. Farrington*. What if the departmental statement is alleged to differ from statements made in the course of the Oireachtas debate? What

if there are contrary statements made by members of the Oireachtas who vote for the legislation? What if, as must often be the case, there is no such clear-cut policy statement in respect of the specific issue arising in the litigation? In such a case, does it follow that it will not be possible to challenge the legislation at least on grounds of disproportionality? What *evidence* is necessary to show the proffered justification fails the constitutional test? If, as the respondents contend, assertion on oath by the applicants is insufficient, then it would seem to follow that some evidence of a policy nature, and therefore, presumably expert evidence, *is* necessary, indeed essential, although this is disavowed by them.

79. The nature of constitutional litigation is such that any contention that evidence of a policy nature is required, is one that should be approached with some caution. The place for policy arguments is in the Oireachtas and in the wider democratic process. When legislation is challenged on the grounds of alleged repugnancy to the Constitution, it may be the case that a policy objection to the legislation is part of the motive for the challenge, but it is central to the legitimacy of the process that the position is maintained that a different question is being addressed, one of law and not politics or policy, and resolved in a different way, by legal reasoning and not democratic vote.

80. I must conclude that the High Court and the Court of Appeal accepted the respondents' argument that evidence as to policy going beyond evidence establishing standing to sue or impact on constitutional rights was *essential* in this case in order to challenge the constitutional validity of legislation on grounds that it involved a disproportionate interference with constitutional rights. For reasons already set out, I must conclude that that proposition, at least at the level of general application at which it may have been expressed and understood, is incorrect. There is no absolute or general rule that expert evidence or evidence in relation to

policy must be adduced in support of a challenge to the constitutional validity of legislation, so that any claim which does not have such evidence or evidence in relation to policy *must* be dismissed and any application for leave to seek judicial review which is not grounded on such evidence must be refused. The position is more complex and will depend on the nature of the challenge brought, and the disposition of the proceedings.

81. The position in relation to evidence in a constitutional challenge, particularly one raising the proportionality of a measure, is more nuanced than any simple blanket rule might suggest. First, in a general constitutional challenge that a particular measure on its face offends a specific constitutional provision or constitutionally guaranteed right, it is not necessary or essential to adduce evidence beyond such evidence as necessary to establish standing to sue and the impact on a constitutional right. This may well be proof of the same thing in some cases and involve little more than formal evidence on an issue, if indeed it is not admitted. It is possible to advance arguments to contend that as a matter of legal analysis and logical deduction, that a provision offends a specific constitutional provision, or a right which is expressly guaranteed. It is indeed neither necessary nor perhaps particularly desirable that such litigation should routinely become the parade of experts feared by Professor Hogg. The constitutional validity of legislation affecting all persons within this jurisdiction should not depend on the particular witnesses which can be assembled at any given time to give evidence in court proceedings on a specific day, nor on the impression a trial judge forms of that evidence. Thus, it is not the case that evidence going to the substance of the claim is an essential component of any challenge. In many cases it will, of course, be helpful to give such evidence, which in particular cases may range quite broadly but it cannot be said to be essential, and even when evidence is adduced then it is

important to keep focus on the nature of the issue to be determined, and the place of evidence within that scheme.

82. Claims that a provision interferes with a right protected by the Constitution, and which relies on proportionality analysis can more obviously raise questions upon which it might be thought that evidence can be helpful, and in some cases, necessary. But even then, it is important that this is not an invariable case. The initial questions of the objective of the legislation, whether it is legitimate, the nature of the interference with any such right, and if so whether it is the minimum necessary to achieve an object are in principle, and often in practice, capable of being addressed without expert evidence and of being resolved on the basis of analysis and argument. While evidence might be helpful its presence is not essential, and its absence is not necessarily fatal. *Heaney* itself, it is to be noticed, proceeded in precisely this way and without any oral or expert evidence. The question of the proportionality of the measure, which is most often the subject of real dispute in any such claim, is one more open to evidence since the issue is one of balancing and therefore, measurement, but even then evidence cannot be said to be essential. Even then, it is important to remember that the factors being balanced are not necessarily commensurable and an element of judgement is unavoidable.

83. The question of whether evidence goes beyond being merely desirable but rather essential in any particular case may, therefore, depend upon the precise case made, and the information available at the time. If, for example, it is sought to argue that the objective publicly presented, and perhaps recited in the legislation, is in truth not the objective sought to be achieved by the legislation, or, that the State's assessment of it, or the measures necessary to address it is plainly wrong, then evidence would be necessary. In particular, the position in a case may be different if, as here, there is already substantial information on the face of the legislation in the shape of

recitals and statements of facts to which, for example, a minister must have regard, and even more clearly if, as here, an application for leave to seek judicial review is made on notice, and detailed evidence has been adduced on behalf of the State respondent. Even if the position is reached that evidence will routinely be adduced in such cases, it cannot be said that evidence, beyond that establishing standing and impact, is essential in every case where proportionality is raised. For example, it may be entirely possible to argue that accepting the justification for the measure identified in the legislation or the recitals, the measure is nevertheless a disproportionate interference with constitutional rights. This is particularly so because the judgment involves an assessment of the value to be attributed to the constitutional right, the extent of the interference with it, and the weight to be given to the justification offered. These are not matters susceptible to evidence: they are matters of analysis.

84. Turning then to this case, it is appropriate to remind ourselves that the question which has occupied this Court must be placed in its proper context. The High Court rejected the arguments made that the measures were such that they could only be introduced under the emergency provisions of the Constitution set out in Article 28.3.3°, or that the Oireachtas was invalidly constituted when it passed the measures, or that they interfere with the rights of the family. The High Court also held that the applicants had not established standing to challenge the provisions of the Mental Health Act, 2001 or the Residential Tenancies Act, 2004. The Court of Appeal in turn upheld these conclusions, and rejected the further arguments that the High Court judge was somehow disqualified from dealing with the matter, and the arguments arising from the manner in which the High Court hearing was conducted and in particular the limitation on numbers in the courtroom. Although these matters occupied the bulk of the applicants' submissions, both written and oral, leave was not granted to appeal to this Court on any of these issues.

85. This leaves, however, the claims made in respect of the inviolability of the dwelling, freedom of assembly, the practice of religion and perhaps, in a broader way, the liberty of the citizen and, specifically, that there had been a disproportionate interference with those rights. These were, on any view, a small part of the case which was sought to be advanced by the applicants, and formed only a small part of the judgments in the High Court and Court of Appeal. Nevertheless, the appellants do maintain that the measures are a disproportionate interference with these rights, in circumstances where it appears they do not accept that the threat to public health was of the nature, or severity, which it appears the Government and Oireachtas believed it to be.

86. When considering this issue, it must be recalled that the measures had the benefit of detailed recitals set out in para. 3 above, setting out the basis upon which they were introduced. This indeed was something advocated by Costello J. in 'Limiting Rights Constitutionally' (*supra*) as useful in providing a court with an explanation of the objectives of, and justification for, the legislation. These recitals cannot be ignored. Instead they must be given full weight as expressing the background against which the Oireachtas considered it was enacting the measures in question, and the objectives sought to be achieved by them. In this case, those detailed recitals are supplemented by extremely extensive affidavit evidence exhibiting documentation including the regular minutes of the meetings of National Public Health Emergency Team (NPHET), and meetings and reports of the WHO and the European Centre for Disease Prevention and Control (ECDC). The question is not, therefore, whether the applicants' claim might have obtained leave if there were no recitals in the legislation and, in particular, if no evidence had been adduced. Rather, the applicants' case in this regard must be assessed in the light of the existence of the recitals and the evidence.

The Appellants' Challenge to the necessity for the Measures

87. Notwithstanding the narrowing of the case in this Court, the applicants repeatedly emphasised a very broad and striking claim – i.e., that the justification offered both in the recitals and the evidence here was not true, and that the legislation in question was based, in part, on a global conspiracy to undermine the rights of citizens and even the administration of justice, in pursuit of a global joint venture involving foreign states and substantial enterprises. It was referred to in the course of oral submissions by the first named applicant as "The Great Reset". This can be illustrated by an extract from the applicants' replies to the Court's Request for Clarification delivered on the 10 March, 2022, shortly before the hearing:-

> "We challenge in principle the idea that fundamental rights, God-given and indefeasible, may be abrogated suspended or deleted in circumstances where no possibility is allowed for the citizen to challenge such an initiative. We challenge the particular circumstances in which the instances in the present case occurred, wherein no proper evidence was adduced in public whereby it might be understood that a genuine emergency – one requiring immediate action, to be reviewed when the dust had settled – was occurring. We submit that all these measures were introduced as part of a global lockstep orchestration by governments and supranational bodies, on the sole basis of predictive models which were on their face absurd (and were subsequently demonstrated to be so), without due diligence, without a correct application of the proportionality principle, with but the merest token of democratic discussion. There are many things in the Measures that we have raised by way of posing objections, and whatever the exigencies forced upon us by the present case, continue to insist that the entire panoply of Measures was wrongheaded,

destructive, barbaric and unlawful, and resulted in the unnecessary deaths of thousands of Irish people."

88. I have no doubt that, insomuch as this global challenge to the basis for the Acts and Regulations was to be advanced as a ground upon which the Court should consider that the legislation enacted by the Oireachtas was invalid having regard to the Constitution, then at a minimum, it required some plausible foundation in evidence, and none was provided. The claim was not simply that the legislation constituted a disproportionate interference with constitutional rights, it was that it was unconstitutional because it was the product of a conspiracy. In his reply, the second applicant said, for example:-

> "There was this pandemic, there was this emergency. But the whole point of us coming here is that we want to say to the Court: was there? We think not. We believe we can show you that there wasn't in a full hearing. We can adduce evidence to do with the PCR tests and the very, very unsafe nature of these which has been acknowledged by their inventor before he died. The very, very suspicious mode of certification of deaths where people who […] died within 28 days of a PCR test were judged to have died of COVID regardless of their injuries or underlying conditions. All of these things which, with all due respect people who have not been […] outside the mainstream would be completely unaware of, I fully accept that. And that's kind of what I'm talking about in the context of, you know, this creation to the operation of subsidised media: an absence of opposition at parliamentary level. You have a sort of pseudo-reality constructed which everybody believes in but actually, when you start to go into it, but only at a full hearing […]".

The submissions of the first named applicant were even more extreme. It might indeed be a difficult question as to precisely how much evidence would be necessary and how apparently cogent it should be, given the basis set out for the legislation and the strong presumption of constitutionality of measures embodying judgements on social issues and matters of economy and public health – it would, for example, appear insufficient to merely establish that there was another school of scientific thought – but it is not necessary to determine that issue here, as there was no evidence of any kind adduced at this stage to support the case of a global conspiracy of governments and supranational bodies based on false information.

The Appellants' Case on Proportionality

89. This brings us to an aspect of the case where there was a clear mismatch between the relative lack of emphasis which the applicants put on an aspect of their case, and the importance the Court has attributed to it, both in granting leave and in considering the substantive appeal. In addition to the wider-ranging claims, the applicants did undoubtedly contend that the measures were disproportionate. This claim also involved a challenge to the State's assessment of the public health situation, where, however, the court was presented with the detailed evidence of Ms. Ryan, supporting the matters recorded in the recitals to the legislation. In my judgment, the applicants' case required some plausible evidence that would be capable of making an arguable case that the State's assessment was beyond any permissible view of the relevant situation. Given the extensive evidence about that was happening, not just in Ireland but in the world, that may have been a difficult task, but, in any event, no evidence of any sort was adduced.

90. Even then, it would, in theory, have been possible to argue that, accepting the State's assessment of the public health situation, the measures were disproportionate generally, or perhaps that less

intrusive means could have achieved the same objective. But the applicants did not seek to make that case, either in general or in relation to any specific measure, perhaps unsurprisingly, since that would have involved accepting, even for the sake of argument, the State's assessment of the public health situation. But that has an inevitable corollary: if the applicants accepted the State's assessment, then it was possible to advance an argument without adducing their own evidence, but if the applicants' case involved contradicting the State's position set out in the recitals, the legislation, and the detailed evidence put forward by Ms. Ryan, then evidence, of some weight and cogency was necessary. No such evidence was advanced. Accordingly, I would conclude that the learned trial judge and the Court of Appeal were correct in the circumstances of this case, and that even the limited claim of lack of proportionality which was sought to be advanced in the face of the recitals in the legislation, and the extensive evidence adduced, did not reach the threshold of arguability. I should add, for the sake of completeness, that in their written submissions to this Court, the applicants sought to include a range of information supporting their contention that, among other things, Covid-19 was no more than a seasonal flu, and that the State's measures were illogical. This information was not evidence in any sense, and the attempt to put it before this Court in the guise of legal submissions only highlighted the lack of any evidence before the High Court. The issue for this Court as identified in the grant of leave to appeal, was whether or not the absence of expert evidence was a sufficient ground to refuse leave to seek judicial review. The premise from which all arguments had to start was that no such evidence had been before the High Court.

Should leave be granted on a different basis?

91. The foregoing deals with matters upon which the Court is agreed. However, Mr. Justice Hogan, in his judgment, would grant a limited leave to seek judicial review. First, and perhaps

fundamentally, he would grant leave to seek judicial review in the nature of a declaration that Arts. 5(1) and 5(2) of the Health Act, 1947, S.I. No. 121/2020 – Health Act, 1947 (Section 31A – Temporary Restrictions) (COVID-19) Regulations, 2020 when read in conjunction with Article 4 of the same regulations, and Article 6 of S.I. No. 128/2020 – Health Act, 1947 (Section 31a – Temporary Restrictions) (COVID-19) (Amendment) Regulations, 2020 and which Arts. 5(1) and 5(2) permit from the holding of and attendance at events, are *ultra vires,* and the Health Act, 1947 (as amended) unconstitutional "insofar as they affect a complete and total ban on the organisation of and participation in a public protest".

92. Second, Hogan J. also considered the restrictions on movement contained in Article 4 of S.I. No. 121/2020. In this respect, Hogan J. considered that some restriction on movement could be justified for an initial period of, say, three months, but that an arguable claim could be made as to the constitutionality and general validity of these measures "insofar as they restricted personal liberty of movement outdoors from 1 July, 2020 onwards". The basis for this was the developing knowledge during the pandemic on the transmission of Covid-19, and the emerging consensus that there was a reduced risk of transmission outdoors.

93. Finally, while acknowledging that, in this respect, the case was somewhat weaker, he would also grant leave to seek a declaration that the restrictions on home visits contained in Article 4(2) of S.I. No. 121/2020 are unconstitutional and *ultra vires* again, with effect from 1 July, 2020 as being incompatible with the substance of rights afforded regarding the inviolability of the dwelling home and the right of association with relatives, friends and others guaranteed by Article 40.6.1°.

94. In support of these conclusions, Hogan J. marshals an impressive combination of historical information from the early years of the State, quotations from a large range of Irish authorities, and has regard to the decisions in other jurisdictions such as *Roman Catholic Diocese of Brooklyn v. Cuomo* 592 US – (2020), *Leigh v. Commissioner of Metropolitan Police* [2020] EWHC 527 Admin ("*Leigh*"), a decision of the French Conseil d'État of 6 July, 2020 *Confédération Générale du Travail et autres,* and the decision of the German Constitutional Court of 16 April, 2020, *De: BV ferG*: 2020 VK 2020415.1BVV082820. The judgment also contains some illuminating quotations from Irish and international authorities such as the judgment of Mr. Justice Jackson in *Railway Express v. New York* (1949) 336 US 106. The judgment also shows an impressive understanding of the public health position in respect of Covid-19 over the course of the pandemic in various countries, and of significant events in this jurisdiction.

95. It bears observation that, almost without exception, these materials, instances and references were not mentioned in the judgments appealed against, the submissions, written or oral, for this Court, and so far as I can see, in the extensive submissions made to the High Court and the Court of Appeal, or indeed, anywhere else in this case. I do not suggest that this, and in particular such reference to legal material, is in itself by any means a fatal objection. Judges are appointed after extensive practice and build up considerable experience in their role. It is, I think, to be expected that they will bring to any case the legal knowledge which they have amassed. Our jurisprudence would be poorer, and our decisions less firmly based, if judges were expected to approach each case as if they knew nothing of the law. This case is undoubtedly enhanced by the wealth of knowledge brought to bear on these matters in Hogan J.'s judgment. In particular, his wide-ranging and nuanced consideration of the development of knowledge of the

transmission of Covid-19 as the pandemic developed and his consideration of the constitutional interests involved perhaps highlights the fact that it appears that measures were adopted on the advice of NPHET, which itself, while containing considerable technical expertise, does not appear to contain any person with expertise in constitutional rights or indeed human rights more broadly, and it is not apparent that the process of converting that advice into guidelines and sometimes binding regulations involved any separate assessment of these matters.

96. However, the sheer breadth and novelty of the material relied on in the judgment point to the fact that the matter focused upon and discussed at length in the judgment is certainly radically, and in my view, fundamentally, different to the case made by the appellants. This raises a difficult question as to the extent to which it is permissible for a court considering the grant of leave to seek judicial review, or indeed an appeal from a refusal to grant leave, to remould or refashion the claim. Put shortly, given the short time limits in judicial review, the constraints imposed by the doctrine of *res judicata*, and the rule in *Henderson v. Henderson* (1843) All E.R. Rep. 378, I do not consider that, even allowing for the importance of clarity and precision in pleadings as set out in O.84, r.20(3) that an applicant's case must be considered solely on the precise formulation of the case contained in the pleadings: some latitude may be allowed. However, I consider that the length to which it is necessary to go to reach the position set out in the judgment of Hogan J. is well beyond any permissible adjustment of the case being advanced by the applicants and has only the most tenuous connection to it.

97. It is apparent that the principal focus of Hogan J.'s judgment is a detailed analysis of the provisions of Article 5 of S.I. No. 121/2020 with particular reference to what is described as the right to protest. The right to protest is not itself protected by the Constitution in those terms. However, what has been referred to describes the intersection of two important, indeed vital

freedoms deemed essential to the civil and political rights guaranteed by the Constitution: freedom of assembly and freedom of speech. I do not doubt, therefore, the importance in a democratic society of the freedom to assemble in public for the purpose of protest. Hogan J. refers to para. 25 of the applicants' affidavit of 1 May in which they referred to Article 5 of S.I. No. 121/2020 and contended it directly affected them by "preventing and impeding our right of peaceful assembly whether for the purposes of peaceful protest, viewing the administration of justice in the courts, or otherwise". He concludes, "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". If indeed this was the applicants' case, then an issue would arise certainly as to the interpretation of the Constitution, the parent act and the provisions of Article 5 and possibly Article 4 of the 2020 Regulations which would require to be addressed with some care. It is noteworthy, however, that this issue – the extent to which the article could be said to have effected a complete ban on protest, and what the Constitution required or permitted in that regard – was not addressed in any of the submissions in this case, and accordingly, Hogan J. was obliged to offer his own interpretation of the relevant provisions, and indeed the constitutional provisions.

98. A future reader approaching this case only through the prism of the written judgments and having no access to the papers might be puzzled by the debate about this issue. If the only, or perhaps main, issue raised was indeed the terms of the sentence in paragraph 25 of the grounding affidavit, it might appear that the appeal properly raises the important issues discussed in the judgment of Hogan J. It is accordingly necessary to consider the case as presented to the High Court and the Court of Appeal, and in respect of which this Court granted leave.

99. The applicants initially relied on a comprehensive statement of grounds undated, but it appears made on 15 April, 2020. It comprises 33 closely-typed pages. That statement of grounds was supported by a single-page verifying affidavit but, as the case developed, a joint-affidavit of the applicants was delivered, again undated, but apparently made on 1 May, 2020. This contains 28 closely-typed pages. The applicants also provided written submissions to this Court of 54 pages including appendices and their replies to the request for clarification made by the Court runs to 13 full pages. I believe it is correct to say that apart from one other reference in the same affidavit, and in the same terms, the extract from paragraph 25 of the affidavit referred to by Hogan J. is the only reference of any substance to a claim in respect of a right to a protest.

100. This reference must itself be considered in the context of the very broad and wide-ranging claim made. A case was made at some length and in some detail by the applicants. I do not think the provisions of Article 5 of the Regulations, whether by reference to the right to protest or otherwise, can on any view be said to have been the focus of the applicants' claims. The Statement of Grounds makes it clear that the applicants challenged the validity of the Health Act, 2020 and the Emergency Measures Act, 2020. The basis for the challenge to this primary legislation involved a direct challenge to the necessity of any measures, but also a contention that such measures could only be introduced pursuant to the provisions of Article 28.3.3°. Furthermore, it was argued that the government, being a caretaker government, was not entitled to advance the measures, and that in any event the passage of the legislation through the Houses of the Oireachtas followed an improper and invalid procedure. The applicants also devoted considerable time and space to challenges to those provisions relating to the amendment of the Residential Tenancies Act, 2004 and the Mental Health Act, 2001. The applicants, in addition, sought to rely repeatedly on the provisions of Article 45 of the Constitution which is expressed

to be not cognisable in any court. Running through all the detail of the claims brought by the applicants was the repeated contention that Covid-19 did not pose the risk to health which the government, the WHO and the ECDC considered it to do. All these claims now fall away, and with them, on any view, the vast bulk of the claim made by the applicants and voluminous documents submitted by them.

101. It is, however, undoubtedly the case that the applicants in the statement of grounds also sought to challenge three statutory instruments made under the provisions of ss.31A and B of the Health Act, 1947 inserted by s.10 of the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act, 2020. These were respectively, S.I. No.121 of 2020 which took effect on 8 April, 2020 and was to remain in operation until 12 April; S.I. No.128 of 2020 Health Act, 1947 (s.31a – Temporary Restrictions) (COVID-19) (Amendment) Regulations, 2020 which extended the said regulations from 12 April, 2020 to 5 May 2020; and the Health Act, 1947 (Affected Areas) Order 2020 made on 7 April, 2020, declaring the State and every region thereof an area where there is known or thought to be sustained human transition of Covid-19. Nothing turns on the provision of this latter Regulation as it merely provided a route for the making of the challenged Regulation applicable throughout the country. The Regulations challenged were limited in time to the period between 8 April, 2020 and 5 May, 2020. While it is of course the case that the pandemic and the response to it in the form of legislation and regulations, persisted, and developed over a much longer period, it was these specific Regulations which were the object of the challenge in these proceedings and the judgment of the High Court upon them, itself delivered on 4 June, 2002, which it is said is erroneous and ought to be set aside.

102. A number of points arise in this regard. It is clear that the proceedings did not challenge the provision of S.I. No. 206 of 2020, the interpretation and effect and possible validity of which are all considered in the judgment of Hogan J. This is not merely a matter of pleading, important though that would be. Those regulations could not have been challenged in these proceedings because, as they were introduced on 8 June, they post-dated both the initiation of the proceedings, and the decision of the High Court. By the same token it is difficult, if not impossible, to understand how the High Court could be faulted for failing to have granted leave to challenge the provisions of Article 4 of the 2020 Regulations on the basis that while short-term measures were permissible, the continuation in force of the restrictions arguably impermissibly restricted personal liberty of movement outdoors from *1 July, 2020* and were similarly unconstitutional and *ultra vires* from the same date insomuch as they imposed restrictions on home visits. Such a claim is plainly beyond the scope of these proceedings, could not have been made by the applicants, and was not made by them in fact. If restrictions on movement and visits were plainly permissible between March and July, then the provisions challenged were valid, and the High Court judgment could not be faulted on that basis. It follows that the order of the High Court could not be impugned for failing to make an order in such terms. These matters, and indeed the consideration given to what Hogan J. describes as the dynamic and ever changing nature of the emergency, and the fact that SARS-CoV-2 is now understood to be an airborne virus so that the case for assessing the proportionality of legislative measures became stronger as the epidemic developed, at least so far as restrictions on outdoor movements were concerned, all illustrate the extent to which the matters considered in his judgment are unmoored from the claims made in this case and considered by the High Court, and in respect of which it refused leave to seek judicial review.

103. This does not turn on the question of whether an appeal for an *ex parte* order is to be treated as an appeal of a fresh application. Even if a fresh application, the proceedings must be judged on the material advanced, the decision or provisions challenged, and the arguments made. The applicants could not have raised in these proceedings any challenge to S.I. No. 206 of 2020 or any other provisions imposing restrictions in June or July of 2020 or thereafter. No provision of those regulations is identified and no interpretation advanced, and no argument made as to the compatibility of any such provision with the Constitution. Nor is this a case of a possible invalid measure avoiding review because of the temporary nature of the restrictions or the speed at which the proceedings progressed. The applicants are fully entitled to challenge the provisions of the regulations as affected them between 8 April and 5 May, and that challenge is not affected by the fact that those regulations have since lapsed.

104. Nor do I think the Court is entitled to depart from these basic principles because of perceived special and unusual features of the case. There is no doubt that the impact of the pandemic and the regulatory response to it were dramatic, and it is and was possible to argue that the measures were not justified by science or by any theory of social organisation or by broader philosophical concerns or were simply imprudent as a matter of practical politics. And some people here and elsewhere have done just that. It is also entirely possible to challenge their validity as a matter of law. However, the fact that any legal challenge may cover the same ground also occupied by scientific or philosophical debate or political dispute, should not obscure the fact that the legal question is a separate one and must be determined in accordance with law. It is, in my view, important that courts approach their task by applying the same standards which are applied to the resolution of any other dispute. That is central to the legitimacy of the exercise by the Court of the power of judicial review. Here the approach advocated by Hogan J. would, at least in my

view, involve the grant of leave for a challenge to regulation which were not challenged by the applicants, or even in existence when these proceedings were commenced, and by reference to evidence which has not been adduced in respect of the course of the pandemic and the development of scientific knowledge in relation to it and by reference to arguments not advanced by the applicant. Indeed, it is a further objection to this course, that it would appear to foist upon the applicants an argument not only not made by them, but which, in so much as it depends upon an acceptance that general restrictions were justified by the scientific evidence at least at the outset of the pandemic, runs counter to the arguments which the applicants did make. I would not grant leave to seek judicial review on the basis suggested by Hogan J.

105. This however, brings us back to paragraph 25 of the joint affidavit and its reference to the right to protest. There is certainly a reference, however fleeting, in the applicants' papers to the right to protest and it is plainly possible to argue that the regulations in existence between 8 April and 5 May were an impermissible interference with a restriction of that right. This does not require any consideration of provisions in place after 1 July, 2020, or any evidence as to the scientific position at that time. Although not discussed by Hogan J., it appears to me that the same point could be made, if anything with greater force, in relation to the impact of the regulations on the practice of religion. The question is whether the reference at paragraph 25 or similar general language in relation to the practice of religion, is sufficient to raise an arguable case that the regulations are invalid, so that leave should be granted even on that limited basis to the argument that the regulations impermissibly interfere with the right to protest (and/or the right to free practice of religion).

106. I respectfully doubt, that on any view the reference in paragraph 25 can be said to be the focus of the claim made by the applicants, even in respect of the Regulations, or that it is to be read

as indicating that the applicants had a desire to protest peacefully and were prevented by the Regulations from so doing. This latter matter is a matter of evidence going to establish standing to make such a claim. I would expect, therefore, that at a minimum the evidence would indicate a specific occasion during the currency of the impugned regulations, the protest contemplated, and the circumstances in which it was said the Regulations had prevented such a protest from taking place – none of this is said. Instead, the statement made is one which is both general, and generic. Thus, after setting out the Regulations, and quoting a number of articles of the Constitution, Article 40.6.1°(ii) and (iii) are set out and the following is said:

> "Such section 5 directly affects each of us and all persons designated "applicable persons" in directly preventing and impeding our right to peaceful assembly whether for the purpose of peaceful protest, viewing the administration of justice in the courts or otherwise in a social context including but not limited to persons with whom we are in a consanguineal relationship, exercising our right to practise our religion or any other religion in congregation with others of similar faith or faiths".

It is clear that this is something asserted which is not in any way specific to the applicants but rather applies to all other persons designated applicable persons, and is not referable to any specific incident or occasion. The affidavit does not indicate any desire on the part of these applicants to carry out a particular peaceful protest any more than it identifies the desire to view the administration of justice in any particular case, or any social context including but not limited to persons in a consanguineal relationship. Nor does it indicate the religion adhered to by either of the applicants, or its tenets, or the manner in which its practice was affected by the provisions of the Regulations. The claim, in each respect, is entirely general and non-specific. Indeed, even more strikingly, this complaint is not in any way focused on the provisions of

Article 5. The immediately preceding Article is set out in paragraph 24, and once again, the relevant provisions of Article 40.6 are set out and the affidavit continues "[s]ubsection (4) directly affects each of us and all persons designate "applicable persons" in directly preventing and impeding our right to peaceful assembly whether for the purpose of peaceful protest or viewing the administration of justice in courts or otherwise in a social context including but not limited to persons with whom we are in a consanguineal relationship". Clearly, therefore, these identical statements do not amount to evidence of any specific event, or intention. The question which arises therefore, is whether these general statements are enough to permit the grant of the limited leave to seek judicial review contemplated by Hogan J.

107. Focusing for the moment on the right to protest it is apparent that little (if anything) was made of this argument in the appellants' case up until now. It did not figure in the High Court's submissions or judgment or in the submissions to the Court of Appeal or the judgment of that Court. The issue was not advanced in the replies of the applicants to the requests for clarification issued by the Court. The issue became live during questions posed to counsel for the respondent during his oral submissions when there was discussion of events such as the anti-racism demonstrations in Dublin and Cork, and indeed, the circumstances in which it was suggested that striking workers were denied the right to protest shortly after the start of the pandemic in March, 2020 which, however, does not appear to have been as a result of the provisions of the Regulations, which were not in force until the following month.

108. These observations, however, only illustrate in my view the significant gap between the proceedings as framed and advanced by the applicants, and the suggested grounds upon which leave should be granted. In his oral reply, the second named applicant addressed the issue of the right to protest which had been debated with counsel for the respondents and said frankly:- "I

was interested in the discussion about the right to protest because we haven't put any emphasis on that. Obviously it's among our grounds but it's not up there, you know", meaning, I assume, that protest had been referred to in the papers but was not the focus of their case. In both respects he was correct. It is true that there is, as we have seen, reference to the right to protest in the documents, most notably in paragraph 25 of the affidavit of 1 May, but it is also that the applicants did not make anything of it. In my view, the general and generic reference in the papers set out above is insufficient to justify the grant of leave on the basis suggested. It is, I think, an important principle, that if a person seeks to challenge a measure they must show at a minimum, that they were adversely affected by it, or reasonably anticipated such adverse impact: see *Mohan v. Ireland* [2019] IESC 18, [2019] 2 I.L.R.M. 1. In this case that would involve in my view, at a minimum, establishing that during the period of the impugned provisions, a person or persons attempted, or at least intended, to assemble for the purpose of peaceful protest but were prevented or at least dissuaded from doing so by the application or perhaps invocation of the provision in question. This, after all, is precisely what occurred in *Leigh,* to which Hogan J. refers. The applicants do not say this or anything like it.

109. This is not simply a point of pleading or evidence, important though that would be. The fact that this issue was not raised and advanced meant that no submissions were advanced to the Court on the questions of the interpretation of the relevant constitutional provisions, and Articles 4 and 5 of S.I. No. 121/2020 (and for that matter Article 6 of S.I. No. 220 of 2020). It follows that no consideration whatsoever was given to these questions in the judgments under appeal.

110. We do not know what interpretation the State parties would advance in relation to any of these issues, or that view the High Court and Court of Appeal might have taken. This might not matter if the provisions bore meanings which were beyond argument. However, in my view, it is clear

that a number of issues arise, such as whether the provisions of Article 40.6.1°.iii permitting a "law preventing … meetings which are determined to be a danger or nuisance to the general public" would permit the prohibition for even a limited period of meetings or assemblies in the interests of public health; whether assembling for protest would, or could be a "reasonable excuse" under Article 4 of the Regulations for going outside the area 2 km from a person's home; and, if so, whether Article 5 could then be interpreted to prohibit assemblies for which persons were entitled to leave the 2 km zone. In this regard, Hogan J. notes the differences between the provisions of Article 5 of S.I. No. 121/2020 and Article 6 of S.I. No. 206 of 2020 and expresses the view that it is far from clear that a peaceful protest would come within the category set out in Article 6 – i.e. "sports, cultural, entertainment, recreation, social community or educational" purposes. But if this is so – and it bears emphasis that the matter has not been the subject of any argument, not least because the provisions of S.I. No. 206 of 2020 are not and could not have been the subject of the challenge made by the applicants – it may indicate that such an assembly is not prohibited by those regulations at all, since it is only assemblies of this class that are the subject of restrictions. If this is a possible interpretation, then that raises a further issue in relation to the interpretation of Article 5 of S.I. No. 121 of 2020. It should be recalled that these regulations were introduced pursuant to the power granted under s.31A of the Health Act, 1947 as amended. Section 31A(16) defines "events" in exactly the same way as Article 6 of S.I. No. 206: that is, sports, cultural entertainment etc. It is arguable that these are the events in respect of which regulations can be made and accordingly Article 5 of the Regulations must be read subject to the statutory definition and on the basis that the "events" which it regulates are events within the meaning of s.31A(16), which may not include assemblies for the purpose of protest.

111. I am more than a little uncomfortable engaging in any speculation as to the meaning of provisions since they have not been the subject of consideration and determination by any other court, or even in submissions made to this Court. I would not seek to draw any conclusion other than it is simply not clear to me that Article 5 of S.I. No. 121/2020 must be interpreted as a matter of law, and was interpreted as a matter of fact in some real circumstance, in the manner suggested by Hogan J.

112. This casts into even sharper relief, if that is possible, the hypothetical and unsatisfactory nature of the claim being discussed. If indeed the applicants had sought to assemble for the purpose of peaceful protest in fact, such assembly and protest might have been permitted, as it appears the anti-racism rallies to which Hogan J. refers were, in which case no claim could arise. On the other hand, such an assembly might have been refused permission, and if that decision was made by reference to the Regulations and was challenged, an issue would arise as to whether the Regulations were correctly interpreted, and if so, their validity having regard to the Constitution. But we lack that necessary, and in my view, essential basis for a claim.

113. These objections are in themselves sufficient but, in my view, it is important that they are not based upon some technical or procedural approach avoiding the substance of the challenge. In my view they are rooted in the function a court fulfils when a challenge is brought to the validity of legislation or legislative measures having regard to the Constitution. Measures such as this are of general application and though undoubtedly burdensome, are complied with by citizens, in part at least because they may believe them to be in the public interest. The model chosen by the 1937 Constitution for considering the validity of legislation, was by action in the courts. Apart from the special case of a reference of a Bill under Article 26 this Court does not consider the validity of legislative measures in the abstract empowered to advise on the wisdom or

validity of legislation. Our Constitution does not establish a form of Conseil d'État as a council of wise citizens empowered to veto legislation in advance or strike it down if enacted**.** Since the decision in *Cahill v. Sutton* [1980] I.R. 269 ("*Cahill v. Sutton*"), it is clear that legislation should normally be challenged only by individuals who can establish that the provisions in question have had a clear and adverse effect upon them in a real and concrete way. This has two aspects. What justifies a court in declaring invalid a provision of general application and which may be accepted and approved of by very many other citizens, is the necessity to do justice to perhaps the single individual who can show that his or her rights (and perhaps no one else's) have been invaded by the provision in question. But it is also considered important that where the validity of legislation is considered, that that should take place against real and tangible facts giving life and focus to the challenge. As Henchy J. put it in *Cahill v. Sutton* "[w]ithout concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality" and without such reality a case loses immediacy, impact and focus.

114. I respect the concerns which have led Hogan J. to dissent and admire the skill with which the arguments are advanced and the materials deployed. The matters raised by him are matters which should be of genuine concern to policy makers, lawmakers and the general public. It is partly because of the importance of those issues that this Court granted leave to appeal. However, I do not agree that it would now be permissible for the Court to attempt the radical surgery necessary to convert these proceedings into the almost entirely different claim envisaged by Hogan J. Nor am I prepared to accept that any of the relevant provisions in question should be interpreted on a basis that any particular protest or speech or assembly was the subject of a comprehensive ban, without that matter being specifically addressed in argument, the relevant evidence assembled and the legal arguments advanced. Nor is it

permissible in my view to attempt to shrink these claims, with their broad-brush attack on the whole concept of any restrictions into a targeted complaint about the specific provisions that may have an impact on freedom of speech and assembly or, for that matter, the free practice of religion. Even if such an approach were permissible in relation to the grounds asserted, I do not think that leave could be granted in this case without some evidence establishing that an applicant had sought to exercise their rights in this regard and been affected by the existence of a relevant measure. I consider, for example, that it would be necessary to establish standing that a person would have to show that they had sought to protest about something (and not necessarily these measures), or had intended to do so, and had either been refused permission, or informed that they would be acting contrary to a specific provision of the Act or of the Regulations or at least had a reasonable apprehension that that was the case. Those are facts that would give the force and urgency of reality to the case. The type of claim here envisaged is very far removed from the claim actually made in these proceedings. To convert this case into a challenge to the operation of the measures because of the possible restriction on the right to protest would be to cross the boundary between refining the case the applicants sought to make and imposing a different, narrower and more focused case upon them which is moreover not supported by any evidence, and which in this case would necessitate accepting the official view of Covid-19 and the risks it posed, something the applicants' case goes to considerable, and sometimes strident, lengths to deny. I do not think the Court should, or indeed could properly, grant leave in this regard.

115. I would conclude therefore:-

(i) Expert evidence is not essential in order to challenge the constitutional validity of any legislative provision;

(ii) Nor is such evidence essential when a challenge is based on a claim of lack of proportionality;

(iii) There is, however, no principle in Irish law that the onus of justifying any legislative measure lies upon a state respondent or shifts to that respondent on proof of interference with or impact upon rights;

(iv) Where, however, a substantial explanation for measures affecting rights is available on the face of the legislation, and in evidence adduced, the question of whether it is necessary to establish an arguable case in validity will depend on the nature of the challenge;

(v) It may be possible to advance a claim that while accepting the objective identified in the legislation and the assessment of the circumstances giving rise to the legislation, that nevertheless the measures adopted are excessive and lack proportionality. Such a claim may be advanced by argument and analysis alone without necessarily advancing evidence;

(vi) If, however, the claim made involves a challenge to the objective identified on the assessment contained in the legislation and/or supporting evidence, then some plausible evidence would be required to establish that there was an arguable case that this was so;

(vii) In this case, by the time the High Court came to make its decision there was in the legislation, and in the evidence submitted, substantial support for the measures. The claim made did not accept that evidence and argue for its less restrictive means of achieving the objective. Rather it sought to challenge and deny the assessment of the situation and the

necessity for the measures. Such a claim required some plausible evidence to be considered sufficiently arguable to satisfy the threshold for the grant of leave to seek judicial review; and

(viii) No such evidence was adduced, and accordingly the High Court was correct to refuse leave to seek judicial review.

116. In the light of these conclusions it is possible now to address the questions set out at paragraph 29 above:-

(i) It cannot be said that scientific or medical evidence must be adduced to obtain leave to seek judicial review where it is alleged that such provisions lack proportionality.

(ii) Since expert evidence is not generally necessary, it follows that there are cases in which leave may be granted without such evidence whether because the impact of the challenged measure is so immediate and significant that it is obvious that it is arguable the measures are disproportionate. For the reasons set out above, this is not such a case.

(iii) The onus of proof of proportionality does not shift to the State if it is established that there has been an interference with the constitutional rights. Acts of the Oireachtas are presumed constitutional until the contrary is shown, and the onus of doing so lies upon a party asserting such invalidity.