COURT OF APPEAL

CIVIL

Record No
The High Court Record No 2020 271 JR

BETWEEN

GEMMA O'DOHERTY AND JOHN WATERS

-V- **Applicants/Appellants**

THE MINISTER FOR HEALTH

AND

IRELAND

AND

THE ATTORNEY GENERAL **Respondents**

AND

DAIL EIREANN, SEANAD EIREANN AND AN CEANN COMHAIRLE

Notice Parties

Notice of Appeal (Ordinary Appeal)

Date of Filing .....

Name of Appellant(s) **Gemma O'Doherty and John Waters**
The Gables
Foxrock
DUBLIN 18

Appellants Solicitors **Applicants in Person**

Name of Respondents **The Minister for Health, Ireland and**

The Attorney General

Respondent's Solicitors **Office of the Chief State Solicitor**
Little Ship Street
DUBLIN 8

Has any appeal (or application for leave to appeal) previously been lodged in the Court of Appeal in respect of the proceedings? **NO**

Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings? **NO**

1. Return Date for Directions Hearing

TAKE NOTICE that this Appeal is listed before the Court of Appeal for Directions at the following date and time:

Date .....

Time .....

2. Decision that is under Appeal

Name of Judge **Mr. Justice Meenan**

Date of Order/Judgment **Order perfected 17th June 2020 (Final Order, Costs)**
Judgments delivered electronically on 13th May 2020 and 4th June 2020

Neutral citation of the Judgment appealed against **[2019] IEHC 209 and [2019] IEHC 274**

The relevant orders made in the High Court:

1. The Applicants' application for leave to issue Judicial Review proceedings do stand refused
2. The Respondents and Notice Parties do recover as against the Applicants the costs of the proceedings said costs to be taxed in default of agreement
3. The Applicants' application for a stay on the order is hereby refused

It is sought to appeal from the entire judgments of the High Court.

3. Grounds of Appeal

Judgment delivered 13th May 2020

1. In all the circumstances of the case the learned High Court judge erred in fact and/or in law in dismissing the Appellants' application made pursuant to Order 84 Rule 21(1) of the Rules of the Superior Courts by misstating the factual background to the Appellants' application in section headed “Introduction” of Judgment 2020 IEHC 209.

2. The learned High Court judge erred in fact and/or in law by misrepresenting emerging reports concerning the extent, nature and effect of COVID19 in Italy and consequently failed to consider the evidence and submissions presented by the Appellants and the submissions of the Appellants with respect to any consequent transmission to Ireland.

3. The learned High Court erred in fact and/or in law by advancing that “the First Named Respondent took a number of measures to halt the spread of COVID19 and to address the economic and social effects of the virus” including but not limited to the enactment of the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act, 2020; the Emergency Measures in the Public Interest (Covid-19) Act, 2020, the Health Act, 1947 (Section 31A Temporary Restrictions) (Covid-19) Regulations, 2020 and the Health Act, 1947 (Section 31a – Temporary Restrictions) (Covid-19) (Amendment) Regulations, 2020, whereas the questions as to whether these measure were adequate, necessary, reasonable or justified were central to the application before the Court.

4. The learned High Court judge erred in fact and/or in law by advancing that SI No 153/2020 being Health Act 1947 (Section 31A – Temporary Restrictions) (COVID 19) (Amendment) (No.2) Regulations extended the regulations to 18th May 2020 the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID 19) (Amendment) Regulations 2020 having first lapsed without lawfully being renewed.

5. In all the circumstances of the case the learned High Court Judge completely failed to consider the evidence and submissions of the Appellants presented to him as to the extent, nature and effect of COVID19 in Ireland and the consequent adverse economic and social consequences of the legislation enacted allegedly to halt its spread.

6. The learned High Court Judge then erred in fact and/or law by holding that following the General Election of February 8th 2020 and the newly elected Dail sitting on February 20th 2020 failing to elect a new Taoiseach, that under the provisions of Article 28.11.1 (of the Constitution of Ireland) the Taoiseach resigned and that the Taoiseach and other members of the Government continue to carry on their duties until their successors are appointed when no evidence to this effect was presented by the Respondents to the Court.

7. The learned High Court Judge erred in law and under the Constitution of Ireland by failing to address the issue of the elision by the Acting Government and the Oireachtas of the fact that Constitution of Ireland itself provides for strictly limited circumstances by which said Constitution or any of its provisions may be suspended or abridged, circumstance which are as provided for under Article 28 requiring conditions of "war or armed rebellion" and that no such conditions faced the Respondents or Notice Parties at the time the legislation in respect of Covid-19 was being enacted and that, in this context alone, there arose a significant issue of unconstitutionality for which the Appellants had submitted an arguable case Paragraph 7 of their Statement of Grounds, Paragraph 15 of their joint Affidavit, and in delivered oral Submissions. The learned High Court Judge then additionally failed to accept and rule that the legislation was unconstitutional and incompatible with Article 28 when the Respondents admitted in their submissions that they were not relying on the provisions of Article 28.3.3° so as to make the legislation immune from constitutional attack and the admission that legislation to address an emergency other than "in time of war or armed rebellion" has to be constitutional.

8. The learned High Court judge erred in fact and/or law by openly misstating and holding that the original Statement of Grounds filed by the Appellants did not state with any clarity what reliefs the Appellants were seeking. The original Statement of Grounds at Paragraph (d) Reliefs Sought, on Page 1 clearly specified that the reliefs sought by the Appellants were: (i) An Order of Certiorari setting aside the legislation as aforementioned and described therein on the grounds of its unconstitutionality; (ii) Further or other Order as the Court may direct; and (iii) Costs.

9. The learned High Court Judge erred in fact and/or law by holding that the Appellants were invited on two occasions by the Court to deliver legal submissions in support of their application but chose not to do so, as no onus or requirement falls on the Appellants to submit written submissions at an application for Judicial Review but notwithstanding same detailed oral submissions were delivered to the Court by the Appellants on 5th and 6th of May 2020.

10. The learned High Court erred in fact and/or law by misstating the Appellants' submission to the Court in respect of the refusal of the Judge to permit access to the public to the Court contrary to the provisions of Article 34.1 of the Constitution. The learned High Court Judge directed that no members of the public would be permitted access to the Court hearing and his representation that the Appellants opposed a direction of "limited access to the Court for members of the public who wished to attend" is erroneous and a misrepresentation of the true facts.

11. The learned High Court erred in fact and/or law by misstating the provisions of Part 2 and Part 5 of the Emergency Measures in the Public Interest (COVID 19) Act 2020 and the Appellants' submissions in relation thereto.

12. The learned High Court judge erred in fact and/or law by holding that the burden of proving that the legislation in question is repugnant to the Constitution lies on the Appellants.

13. In all the circumstances of the case the learned High Court judge erred in fact and/or law by failing and excluding to reference and consider in delivering Judgment the contents of the Appellants' Statement of Grounds dated 15th April 2020 and Affidavit of Fact dated 5th May 2020.

14. In all the circumstances of the case the learned High Court judge erred in fact and/or law by failing to consider and reference in his Judgment the substantive submissions of the Appellants delivered orally on 5th May 2020 and furthermore misrepresented the contents of such submissions.

15. In all the circumstances of the case the learned High Court judge erred in fact and/or in law by accepting the submissions of the Respondents on the issue concerning the procedure followed by the Appellants in challenging the constitutionality of the legislation and holding that were he to reach the conclusion that the Appellants had established an arguable case that the correct course would be to order that the proceedings continue as if they had been begun by plenary summons.

16. In the all the circumstances of the case learned High Court misapplied the principles and tests in *G. v. Director of Public Prosecutions [1994], Esme v. Minister for Justice and Law Reform [2015] IESC 26, Agrama v. Minister for Justice and Equality [2016] IECA 72, Cahill v. Sutton [1980] I.R. 269, and Mohan v. Ireland [2019] IESC 18* to the Appellants application for leave to bring Judicial Review proceedings by holding that they had failed to establish an arguable case notwithstanding that the threshold in a leave application for Judicial Review proceedings is low and the burden of proof on applicants relatively light.

17. In all the circumstances of the case the learned High Court Judge wholly failed, neglected and refused to address and consider the facts, grounds and submissions before the Court by the Appellants in respect of their argument that the legislation the subject of the Appellants' application was incompatible with Article 40 of the Constitution which relates to the personal rights of the citizen.

18. In all the circumstances of the case the learned High Court Judge wholly failed, neglected and refused to address and consider the facts, grounds and submissions before the Court by the Appellants in respect of their argument that the legislation the subject of the Appellants' application was incompatible with Article 44.2 of the Constitution which relates to the free expression and practice of religion.

19. In all the circumstances of the case the learned High Court Judge wholly failed, neglected and refused to address and consider the facts, grounds and submissions before the Court by the Appellants in respect of their argument that the legislation the subject of the Appellants' application was incompatible with Article 45.2 of the Constitution which relates to the right to earn a livelihood and make reasonable provision for one's domestic needs.

20. The learned High Court judge erred in fact and/or in law by holding that no case has been made out that s. 31A, s. 38A or any other amendment to the Act of 1947 is inconsistent with Article 41 of the Constitution headed "The Family".

21. The learned High Court judge erred in fact and/or in law by holding that the legislation the subject of the Appellants' application did not breach Article 41 of the Constitution despite acknowledging that the restrictions set out in such legislation undoubtedly interfere with normal family life.

22. In all the circumstances of the case the learned High Court judge erred in fact and/or law by holding that the Appellants had not met the threshold of an arguable case notwithstanding holding that the restrictions set out in the legislation the subject of the Appellants' application undoubtedly interfere with normal family life.

23. The learned High Court judge erred in fact and/or in law by failing to consider the Appellants arguments as set out in the Statement of Grounds and Affidavit and further advanced in oral submissions

with respect to the personal rights of the citizen and the unenumerated right to bodily integrity as provided for by Articles 40.3.1 of the Constitution.

24. The learned High Court judge erred in fact and/or in law by failing to consider the Appellants arguments as set out in the Statement of Grounds and Affidavit and further advanced in oral submissions with respect to the inviolability of a person's dwelling as provided for by Article 40.5 of the Constitution.

25. The learned High Court judge erred in fact and/or in law by failing to consider the Appellants arguments as set out in the Statement of Grounds and Affidavit and further advanced in oral submissions with respect to the rights as to free movement of persons and assembly as provided for by Articles 40.4 and 40.6.1 of the Constitution.

26. The learned High Court judge erred in law by holding that the Appellants were are not entitled to rely upon Article 45 of the Constitution.

27. The learned High Court erred in fact by holding that the Appellants had made no case that any unenumerated constitutional right was breached.

28. The learned High Court judge erred in fact and/or in law by advancing that there was a complete failure of the Appellants to put on Affidavit facts that if proven could support the view that the restrictions and limitations of rights as set out in the legislation are disproportionate.

29. The learned High Court judge erred in fact and/or in law by implying that the Appellants should have updated their narrative in their Statement of Grounds and Affidavit prior to the ex parte application for leave to bring Judicial Review proceedings being made on 15th April 2020 when the legislation itself was passed on 20th March 2020 and the learned High Court judge concurrently completely failed to acknowledge and reference the facts and averments of the Appellants with respect to the manner in which such legislation was passed and the evidence in respect of the incidence and effect of COVID-19 within the State at the point of such legislation's passage through the Houses of the Oireachtas.

30. The learned High Court judge erred in fact and/or in law by implying that the Appellants should have introduced and exhibited independent expert opinion in the Statement of Grounds or Grounding Affidavit in the context of a preliminary leave application and furthermore misunderstood the facts as set out by the Appellants and their grounds for bringing an application as in any event in all the circumstances of the case and the facts set out on Affidavit by the Appellants no such independent expert clinical opinion is relevant.

31. The learned High Court judge erred in fact by holding that the Appellants "*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*" and by so doing misrepresented and misstated the contents and facts of the Statement of Grounds dated 15th April 2020 and the Affidavit dated 5th May 2020 before the Court and the oral submissions advanced by the Appellants to the Court on 5th May 2020 and failed to consider such filed facts and averments when drafting his judgment, and in so doing demonstrated a bias against the Appellants and their entitlement to mount a challenge at all.

32. The learned High Court judge erred in fact and/or in law by holding that the Appellants do not have standing to challenge the amendments to the Mental Health Act, 2001 and the amendments of the Residential Tenancy Act, 2004, and in all the circumstances failed to acknowledge that the threshold for an arguable case was reached by virtue of the standing of the Appellants as citizens, residents and natives of Ireland, as well as property and/or home-owners within the jurisdiction, and therefore potentially affected by any of the measures included in these amendments, and so liable at some future time to be subject to their provisions, it being, purely for example, the case that one of the Appellants had in the recent past been a landlord and might well become such again at any time in the future, including the

near future, and therefore become exposed to what is to be regrded as a direct interference by the Minister with the ability of a person to occupy and dispense with property in their ownership and which they maintain, this being a circumstance conveyed to the learned judge during oral submissions but subsequently overlooked by him in formulating his Judgment, and notwithstanding that, given the terms of the legislation, it was unnecessary to assert as much for the purposes of obtaining leave for Judicial Review, it being the case that any person may at any time choose to let his home or other property for reward without notice to the Courts or without such an initiative materially altering the status of such person before the Courts or the law. The learned High Court judge erred additionally in fact and in law by failing to recognise that, by the definition of an "applicable person" within the description and characterization of same in the legislation, the new Section 38A(10) of the 1947 Act as inserted by the Health Act 2020 provides by implication and probability that each or either of the Appellants, by virtue of the risk of being deemed a "*potential source of infection*", even if not actually infected with COVID-19 nor suffering from symptoms nor tested for COVID-19, but additionally or in the alternative in such conceivable circumstances as having fallen ill with such a condition, would be liable to fall within the necessary definitions set down in the legislation and therefore likely to be deemed such an "affected person" or "affected persons" and thereby potentially subjected and made amenable to the provisions of the Act as amended within the meanings and terms of the said Act.

33. In all the circumstances of the case the learned High Court judge failed to consider the submission of the Appellants and hold that the First Named Respondent, in making regulations under the statute in question, was acting unconstitutionally.

34. In all the circumstances of the case the learned High Court judge erred in fact and/or in law by accepting the submission of the Respondents that the European Convention on Human Rights (European Convention on Human Rights Act, 2003) is not directly effective and that measures cannot be invalidated on the basis that they are repugnant to it and that the Charter of Fundamental Rights and/or other EU law does not apply to domestic law.

35. In all the circumstances of the case the learned High Court judge erred in fact and/or in law by failing to consider, reference and rule on the arguments and submissions of the Appellants on the repugnancy of the legislation passed with the provisions of Articles 5, 6, 7, 8 and 11 of the European Convention on Human Rights and Articles 1, 6, 7, 8, 9, 10, 12, 15 and 16 of the Charter of Fundamental Rights and the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548/2015) implementing Directive 2004/38/EC authorising the citizens of Member States to move and reside freely within the territory of Member States.

36. In all the circumstances of the case the learned High Court judge erred in fact and/or in law by holding that where the Appellants had standing they did not made any arguable case in support of their claim that the legislation and regulations in question are unconstitutional.

37. In all the circumstances of the case the learned High Court judge factually misstated the arguments and submissions of the Appellants with respect to the background facts and conduct of the First, Second and Third Named Notice Parties and then erred in fact and/or in law in his judgment by ruling on such factual misstatements.

38. The learned High Court judge erred in fact and/or in law by holding that the number of deputies present when this legislation was being debated and passed by the Dáil cannot be considered by the Court.

39. The learned High Court erred in fact and/or in law by holding that the Appellants statement and submissions in respect of the Third Named Notice Party the Ceann Comhairle are non-justiciable as they concern the internal procedures of the Dáil.

40. The learned High Court judge erred in fact and/or in law by holding that the terms “caretaker Dáil” and “outgoing Seanad” have no meaning in law.

41. In the circumstances of the case the learned High Court erred in fact and/or in law by holding that the fact that a number of the members of the Government who were in office at the date of the dissolution of the Dáil are no longer members of the Dáil does not affect the provisions of Article 28.11 and demonstrated bias by interjecting personal commentary that “*one of the duties of the Government is to take steps to address the health and economic issues that arise from the Covid-19 pandemic”* which is contrary to fact and/or to law and amounts to a circular argument that appears to prejudge the case or to convey an impression that the case is being prejudged.

42. The learned High Court judge erred in fact and/or in law by failing to consider the statements and submissions of the Appellants by holding that no case has been made that the Dáil and Seanad that considered and passed this legislation were not validly constituted.

43. The learned High Court judge erred in fact and/or in law by holding that the Appellants have established no arguable case against the Oireachtas and that the case which they seek to make is unstateable and has failed to consider and rule on the arguments and evidence presented by the Appellants in their Statement of Grounds and Affidavit and in oral submissions delivered to the Court on 5th and 6th May 2020 concerning the manner in which the legislation the subject of the Appellants’ application was passed through the Oireachtas.

44. In all the circumstances of the case the learned High Court judge erred in fact and/or in law by holding that amongst measures introduced to prevent the spread of Covid-19 was “social distancing” when no statutory or binding provisions or otherwise have been enacted to mandate the practice.

45. In all the circumstances of the case the learned High Court judge erred in fact and/or in law when, in seeking to justify his decision to refuse public access to the court, by stating that in a court setting, social distancing means that it is no longer possible to have as many members of the public physically present in court as used to be the case, since these are matters depending on a range of factors, including the capacities of particular courtrooms and the level of public interest in specific cases.

46. In all the circumstances of the case the learned High Court judge erred in fact and/or in law by holding that it was always the case that for the hearing of certain actions, not every member of the public who wished to attend in court could do so and in so doing so misrepresented the basis on which he disbarred all members of the public from attending the Appellants’ application.

47. In all the circumstances of the case the learned High Court judge erred in fact and/or in law by holding that with social distancing, the facilitating of members of the public who wish to attend in Court has been reduced, and misrepresented his direction which was that no members of the public would be permitted access to the Court hearing.

48. In all the circumstances of the case the learned High Court judge erred in fact and/or in law in seeking to justify the denial of public access to the Court by holding that it does not follow that, because every member of the public who wishes to attend cannot do so, the hearing is not being held in public, whereas in fact the hearing was clearly not being held in public because no members of the public were permitted to enter the courtroom.

49. In all the circumstances of the case the learned High Court judge erred in fact and/or in law by holding that most members of the general public acquire their knowledge of court cases through the media and erred in his his interpretation of the Constitution of Ireland by implicitly avoiding in the statement '*most members of the general public obtain their knowledge of court cases through the media*' the explicit provision of Article 34.1, whereby it is quite clear that the constitutional requirement is that the hearings of all matters by Court, other than “in such special and limited circumstances as may be provided for by law”, must be open to

the public, which is to say that the Court shall not be in camera, in private or in secret and that provision shall in all cases be made for the attendance at said hearings of members of the public wishing to do so, and therefore that any hearing which takes place in the absence of members of the public when some members of the public have clearly indicated their desire to be present at said hearing shall be deemed invalid by reason of its unconstitutionality under the provisions of Article 34.1.

50. In all the circumstances of the case the learned High Court judge erred in fact and/or in law by holding that the facilitation of certain members of the media who wished to attend to report on the proceedings discharges the Constitutional requirement that justice be administered in public.

51. In all the circumstances of the case the learned High Court judge erred in fact and/or in law by holding that notwithstanding the physical limitations imposed by social distancing on the numbers of the public who could attend in court that these hearings were heard in accordance with Article 34.1 of the Constitution when in fact other than the parties to the application and certain selected members of the media who are concurrently part funded by the Respondents, the learned High Court judge disbarred all members of the public who wished to attend the hearings from access to the Court and has withheld his direction to disbar the public from such hearings from his delivered Judgment.

52. In all the circumstances of the case the learned High Court judge erred in fact and/or in law and demonstrated bias towards the Respondents by failing to consider in full the statements, facts and submissions placed before the Court by the Appellants, and in dismissing their case, asserting that the Appellants "have sought to challenge the constitutionality of certain legislation enacted to combat the Covid-19 virus", whereas in fact the virus is named and known as SARS-CoV-2, thus demonstrating that, whereas the learned High Court judge has sought to disparage and demean the Appellants on the basis that they "have no medical or scientific expertise" but have "relied upon their own unsubstantiated views" (paragraph 56), and whereas the Appellants had made no play of any claim to expertise but presented themselves to the Court as ordinary citizens and human persons who have their dwelling in Ireland as natives and lifelong residents, albeit with some experience of gathering and collating information in their capacities as professional journalists over many years who wished simply to bring about a studied judicial examination of the circumstances in which the Constitution of Ireland had come to be suspended in what became known as the COVID19 "lockdown", the learned judge's own occasional lapses demonstrate the limits of expertise whereby all human persons, including specialists in a given area such as law, may become prone to occasional error, oversight and misapprehension, including such within their own specialities, thereby accentuating that, whereas the Appellants sought in all humility to create an opportunity so that what has been perhaps the most momentous and far-reaching incursion upon the personal and civil rights of Irish citizens and human persons during the time of Irish independence might be judicially scrutinised so that those citizens and human persons residing in Ireland under the protection of the Constitution of Ireland might separately and together avail of an opportunity to witness a thorough judicial examination of the facts of this situation by Judicial Review, in which experts of varied and variegated fields and disciplines might be afforded the opportunity to bring their knowledge and learning to bear upon the many questions pertaining thereto on behalf of said citizens and human persons, including the Appellants, the learned judge has overlooked the entitlements of all said citizens and human persons to such an opportunity on the partial but spurious basis that the Appellants lacked a sufficiency of expertise to bring such a petition, and thereby unjustly deprived the Appellants and all interested Irish citizens and human persons residing in Ireland and seeking the benefits and protections of said Constitution the opportunity to be reassured as to the force and resilience of such protections, notwithstanding that the many anxieties raised by the continuing situation had been adequately outlined and described in the Submissions of the Appellants.

53. In all the circumstances of the case the learned High Court judge erred in fact and/or law by holding that the Appellants have not made an arguable case despite the learned High Court judge holding that the

legislation enacted to address the health and economic issues that arise from the Covid-19 pandemic undoubtedly restrict people's constitutional rights and that the Appellants must depose such facts on affidavit which, if proven, would establish that such restrictions are disproportionate and that no such facts were deposed.

54. In all the circumstances of the case the learned High Court judge has erred in fact and/or in law and demonstrated bias towards the Respondents by holding that the Appellants should have updated the facts set out in their Statement of Grounds and Affidavit up to and including 5th May 2020.

55. In all the circumstances of the case the learned High Court judge has erred in fact and/or in law and misstated the content of the Appellants' Statement of Grounds dated 15th April 2020, their Affidavit of 5th May 2020 and oral submissions delivered 5th May 2020 by holding that "*in court, the applicants gave unsubstantiated opinions, speeches, engaged in empty rhetoric and sought to draw an historical parallel with Nazi Germany. Such a parallel is both absurd and offensive. Unsubstantiated opinions, speeches, rhetoric and a bogus historical parallel are not substitutes for facts*" and by casting such counterfactual slur on the Appellants in his judgment demonstrates that his refusal to allow leave to issue Judicial Review proceedings was prejudged.

56. In all the circumstances of the case the learned High Court judge has erred in fact and/or in law by holding that the making of regulations by the First Named Respondent pursuant to the legislation is constitutionally permissible.

57. In all the circumstances of the case the learned High Court judge has erred in fact and/or in law by holding that the Appellants are not entitled to rely upon the provisions of the European Convention on Human Rights (European Convention on Human Rights Act, 2003) and/or the Charter of Fundamental Rights and/or other EU law.

58. In all the circumstances of the case the learned High Court entirely failed to consider, reference or rule on the arguments and submissions of the Appellants that pursuant to the Affected Areas Order 2020 the Minister deemed every area within the State as an affected area and placed the entirety of the Republic of Ireland itself as a unitary affected area into lockdown based on a presumption or thought as set out in the Order as opposed to fact whilst concurrently not restricting or closing access to the Republic of Ireland to persons outside the State via its ports and airports and via its land border with Northern Ireland, thereby rendering vanquished any assertions by the Minister for Health in the amending the 1947 Act itself that the legislation was necessary to halt the spread of a virus.

59. In all the circumstances of the case the learned High Court entirely failed to consider, reference or rule on the arguments and submissions of the Appellants comparing the extent, nature, spread and economic and social outcomes of countries which did not enact lockdown legislation facilitating that passed by the Respondents, and on the likely consequences of the lockdown for Irish citizens and persons residing within this jurisdiction.

60. In all the circumstances of the case the learned High Court entirely failed to consider, reference or rule on the arguments and submissions of the Appellants in respect of the allegedly questionable manner in which COVID19 cases and alleged COVID19 related deaths were being reported by hospitals, the Coroner, the HSE and other official bodies.

61. In all the circumstances of the case the learned High Court entirely failed to consider, reference or rule on the arguments and submissions of the Appellants in respect of the actual clinical effect and nature of COVID19 on those alleged to carry it and mortality rates and infection figures.

62. In all the circumstances of the case the learned High Court entirely failed to consider, reference or rule on the arguments and submissions of the Appellants in respect of the statistical predictions and non-peer

review models relied on by the Respondents to justify the legislation the subject of the Appellants' application.

63. In all the circumstances of the case the learned High Court entirely failed to consider, reference or rule on the arguments and submissions of the Appellants in respect of the lapse of the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act, 2020 on 12th April and the unlawful renewal thereof contrary to the provisions of the Statutory Instruments Act 1947.

64. In all the circumstances of the case the learned High Court judge has erred in fact and/or in law by holding that the Appellants have made no arguable case against the notice parties (the Oireachtas) and that the case which they sought to make against such parties is unstateable.

65. In all the circumstances of the case the learned High Court has erred in fact and/or in law by refusing the Appellants' application seeking leave to bring judicial review proceedings against the Respondents and by dismissing their application. The learned High Court judge erred in law and in fact in ignoring well established precedent and imposing an unreasonably high standard of proof on the Appellants who were seeking merely leave to bring Judicial Review proceedings, and instead wrongfully established and enabled, in lieu of a leave hearing, what was in effect a full trial of the substantive matters likely to arise at Judicial Review stage, thus radically discriminating against the Appellants who had made preparations in the shortest time possible for a leave hearing directed merely at submitting an arguable case conerning the unconstitutionality of the legislation being challenged by them, this case being copiously elaborated in their written and oral Submissions, which were all but entirely ignored or dismissed by the learned judge.

66. The learned judge has erred in law and in fact by implying in his Judgment and asserting without qualification in open court that it is clear from the wordings of various articles of the Constitutions of Ireland that the rights and freedoms asserted therein are not absolute but may be restricted, without asserting also that it is the responsibility of legislators and the State authorities to demonstrate that such restrictions as are imposed contrary to the wordings and ostensible guarantees of said articles are proportionate to some urgent and exceptional necessity of the common good, this requiring to be certified and justified to the satisfaction of the Courts when so required by a petition of a citizen or citizens, so that the basis of such restriction and the reasons being relied upon for said breach or breaches of constitutional rights be asserted, tested and verified in open court so that citizens might become satisfied that their fundamental rights had continued to be protected and would be so protected into the future, for to rule otherwise would be to decide that the liberty of legislators and State authorities to impose restriction on constitutional rights and freedoms has no limitation set upon it, thereby rendering said Constitution vulnerable to legislative abrogation, so that such understandings, were they to become commonplace and accepted, would amount to the supplanting of the bill of personal rights and freedoms set down in the Constitution of Ireland with an altogether different charter of entitlements, this being a charter enabling legislators and/or State authorities to impose upon the Irish people myriad and arbitrary restrictions or outright losses of fundamental liberties, and in this way enabling the text of said Constitution to become the potent and odious auxiliary of a tyrannous administration.

Judgment delivered 4th June 2020

67. In all the circumstances of the case the learned High Court judge demonstrated bias and prejudged the matter of costs in favour of the Respondents by averring that the legislation and regulations the subject of the Appellants application seeking leave to challenge same were enacted "*to combat the spread of Covid-19 and to address the serious economic and social consequences that have arisen*".

68. In all the circumstances of the case the learned High Court judge has erred in fact and/or in law by prejudging the matter of costs and misstating the chronology and substance of the Appellants' application before the High Court by asserting "the applicants did not deliver any submissions" when oral submissions

were delivered to the Court on 5th May 2020 and 6th May 2020 and no obligation or expectation or burden falls on the Appellants to deliver written submissions in a preliminary leave application for Judicial Review.

69. In all the circumstances of the case the learned High Court judge profoundly erred in fact and/or in law by failing to apply the principles in the UK case of Mount Cook Land Ltd v. Westminster City Council advanced as authority by the Appellants for the proposition that costs should not be given against an unsuccessful party at the leave stage on the erroneous pretext that judgment of the English Court of Appeal does not apply in this jurisdiction and furthermore in substantia elected to rely on Section 169 of the Legal Services Regulation Act of 2015 which has no applicability to the Appellants leave application as Section 169 applies to concluded civil proceedings which the Appellants application was not.

70. In all the circumstances of the case the learned High Court judge erred in fact and/or in law by stating that a "Protective Costs Order" as sought by the Appellants has no application without advancing any argument or authority in support of same and wholly failing to consider such submission of the Appellants.

71. In all the circumstances of the case the learned High Court judge demonstrated ostensible bias and hostility against the Appellants by repeatedly averring in his Judgment that the Appellants failed to advance legal submissions which is a manifest untruth in fact as detailed oral submissions were advanced to the Court on 5th May 2020 and 6th May 2020 and causally misleading as no obligation rests on an applicant to file written submissions in a preliminary Judicial Review hearing.

72. In all the circumstances of the case the learned High Court judge demonstrated ostensible bias and hostility to the Appellants by untruthfully advancing in his Judgment that the Appellants "did not engage with the case being made by the respondents and the Oireachtas in any meaningful way. Rather, they proceeded with their application on the basis that as they were of the opinion they had an arguable case, this, of itself, was sufficient for the Court to grant them leave" and elected to sidestep the detailed written arguments and oral submissions before the Court grounded in bias towards the Respondents having prejudged the substantive matter and the further matter of costs.

73. In all the circumstances of the case the learned High Court judge erred in fact and/or law and demonstrated ostensible hostility towards and bias against the Appellants by advancing the blatant untruth that "the manner in which the applicants conducted their proceedings, their failure to consider or answer the case being made against them and to only have regard to their own opinions meant that these proceedings were very far from being in the public interest" whilst concurrently acknowledging that the legislation the subject of the Appellants' application are "important matters of public interest" therefore such untruth advanced by the learned High Court judge in his Judgment serving to circumvent the arguments advanced by the Appellants in the public interest being ruled upon as the matter had been prejudged in favour of the Respondents.

74. In all the circumstances of the case the learned High Court judge erred in fact and/or law and demonstrated ostensible hostility towards and bias against the Appellants by ignoring and sidestepping and wilfully failing to examine the Appellants written arguments and oral submissions before the Court and consequent on failing to do so ruling that "by reason of the foregoing, I am satisfied that no grounds have been established for me to depart from the general rule that "costs follow the event". I will, therefore, grant the respondents and the Oireachtas (the notice parties) their costs".

75. In all the circumstances of the case the learned High Court judge erred in fact and/or law by holding that "costs follow the event" in the context of a preliminary leave application for Judicial Review and by ordering an award of costs against the Appellants in favour of the Notice Parties in a Judicial Review leave application which runs entirely contrary to established precedent and authority and made such an Order without any foundation other than in a conscious spirit of ostensible bias against and hostility towards the Appellants.

76. In all the circumstances of the case the learned High Court judge erred in fact and/or in law by dismissing the Appellants' application.

77. In all the circumstances of the case the Appellants aver that by the learned High Court judge systemically misstating throughout both his Judgment of 13th May 2020 and 4th June 2020 that the Appellants had failed to advance any evidence, arguments or submissions to the Court and proceeding to dismiss the Appellants' application and order they pay costs to the Respondents grounded on such systemic misstatement that *prima facie* the learned High Court judge has engaged in judicial misconduct.

4. Order(s) sought

1. An Order by way of Appeal setting aside and reversing the Judgment and Orders of the High Court.

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution:

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention:

2. Such further or other Order as this Court should deem moot.

3. The costs of the within Appeal and the proceedings in the Court below.

The Appellants are **not asking the Court to depart from one of its own decisions.**

The Appellants are **not asking this Court to make a reference to the Court of Justice of the European Union.**

4. The Appellants **will request a priority hearing.**

The reason why the Appellants will request a priority hearing is that given that the legislation the subject of the application directly affects all persons resident within the State it is in the interests of natural justice that the within proceeding to the Court of Appeal be heard at the earliest opportunity.

5. Documents relied on

All pleadings and proceedings in the High Court.

6. Appellant Details

Name of Appellant(s)	**Gemma O'Doherty and John Waters** **The Gables** **Foxrock** **DUBLIN 18**
Original status	**Applicants**
Solicitor	
Appellant's Solicitors	**Applicants in Person**
Address	As above
Telephone Number	
EMail Address	

7. Respondent Details

Name of Respondents	The Minister for Health, Ireland and The Attorney General
Respondent's Solicitors	Office of the Chief State Solicitor
EMail:	contact@csso.gov.ie
Address:	Little Ship Street DUBLIN 8
Telephone:	01 417 6100
DX:	DX DUBLIN 186
Postcode:	D08 V8C5
Ref:	

To: Office of the Registrar of the Court of Appeal (Civil)
The Four Courts
Inns Quay
DUBLIN 7

To: Office of the Chief State Solicitor
Little Ship Street
DUBLIN 8

COURT OF APPEAL

CIVIL

Record No
The High Court Record No 2020 271 JR

BETWEEN

GEMMA O'DOHERTY AND JOHN WATERS

-V- **Applicants/Appellants**

THE MINISTER FOR HEALTH

AND

IRELAND

AND

THE ATTORNEY GENERAL **Respondents**

AND

DAIL EIREANN, SEANAD EIREANN AND AN CEANN COMHAIRLE

Notice Parties

Notice of Appeal (Ordinary Appeal)

Gemma O'Doherty and John Waters

Applicants in Person

The Gables

Foxrock

DUBLIN 18

Please submit your completed form to:

Office of the Registrar of the Court of Appeal (Civil)
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

Save in the case of a notice of appeal from a decision made otherwise than *inter partes*, this notice is to be served, within seven days after it has been issued, on all parties directly affected by the appeal. A respondent may consent in writing to late service of a notice of appeal.

Note: The appellant must not later than four days before the date fixed for the directions hearing, lodge with the Registrar and serve on each respondent affected by the expedited appeal an indexed and paginated directions booklet.