COURT OF APPEAL

CIVIL

Record No 2020 147

The High Court Record No 2020 271 JR

BETWEEN

GEMMA O'DOHERTY AND JOHN WATERS

Applicants/Appellants

-V-

THE MINISTER FOR HEALTH

AND

IRELAND

AND

THE ATTORNEY GENERAL

Respondents

AND

DAIL EIREANN, SEANAD EIREANN AND

AN CEANN COMHAIRLE

Notice Parties

Gemma O'Doherty and John Waters

Anti-Corruption Ireland

The Gables

Foxrock

Dublin 18

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INTRODUCTION

In March 2020, the interregnum Government introduced the most draconian restrictions ever imposed upon the Irish people, abandoning long-standing democratic, legal and scientific processes. This unprecedented experiment was purportedly done to protect the public from a 'virus' that is now well-proven to be no more serious than a seasonal flu with a 99.96% survival rate. The Constitution was effectively suspended without proper parliamentary process or judicial oversight as the majority of the population had their liberties removed on the most spurious and unscientific grounds. The public have been placed under effective house arrest for almost one year, deprived of the right to family life, to religious worship, to maintain their livelihood, to travel freely, to attend public gatherings, to bury their dead, to bodily integrity, to stand within six feet of each other, and to privacy.

Children were denied their education, social interaction and the right to a family life.

The devastating impact of the implications of the 'Covid' legislation will be felt for decades to come. It is now well-established that the Respondents' actions have cost

more lives than they saved. There is strong anecdotal evidence of a significant increase in suicides and drug overdoses. Potentially life-threatening illnesses are not being diagnosed in time to allow for effective treatment. A disturbing increase in domestic and child abuse has also been reported.

Countless Irish businesses have been forced to close and will never reopen. Many families are in extreme financial distress as a result. Covid 'subsidies' have led to an enormous increase in the National Debt which will burden taxpayers for generations.

Gardai are engaging in rampant abuse of their powers by violating citizens' most fundamental rights and arresting them when they try to vindicate them. Doctors, hospitals and the mainstream HSE-funded media have a perverse monetary incentive to promote the Coronavirus narrative, terrorising a nation already on edge with their daily agenda of fear and deceit.

There are many conflicts of interests at play between representatives of government, medics, unelected international bureaucracies and pharmaceutical companies whose long-term objectives have clearly nothing to do with public health.

Constitutional scrutiny is necessary to maintain the judiciary's role as the guarantor of Constitutional freedom especially when the Government suspends those freedoms as it has in a manner unprecedented in independence which has caused so much harm to the Irish people.

The solution to a national crisis - even though one does not exist in this case - can never supersede the guarantee of individual liberty which is the cornerstone of the Irish Constitution. From Pennsylvania to Portugal, courts all around the world have ruled that Covid 19 lockdowns are illegal.

The Irish High Court has a duty and responsibility to fully examine issues legitimately brought to it especially when the fundamental rights of an entire population have

been infringed. In denying us the right to leave to allow that to happen, it has gravely failed in its responsibilities to the Constitution and to the Irish people.

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SUMMARY

On 15th April 2020, the Appellants filed a Statement of Grounds and Affidavit seeking leave to issue Judicial Review proceedings pursuant to Order 84 of the Rules of the Superior Courts against the Respondents named herein, seeking an Order of Certiorari declaring the enactment of the following statutory instruments null and void on the grounds of their repugnancy to the provisions of Bunreacht na hEireann 1937:

(I) Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020

(II) Emergency Measures in the Public Interest (Covid-19) Act 2020

(III) Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) Regulations 2020

(IV) Health Act 1947 (Section 31A-Temporary Restrictions) (Covid-19) (Amendment) Regulations 2020

(V) Health Act 1947 (Affected Areas) Order 2020

Following a direction of Sanfey J that the application be heard on notice to the Respondents and a subsequent direction of Murphy J that the within Notice Parties also be notified, the matter was ultimately heard before Mr Justice Meenan on 5th May 2020 and 6th May 2020. The within Appeal is filed with this Honourable Court seeking to reverse the Orders made in the lower Court by Mr Justice Meehan further to Judgments [2019] IEHC 209 and [2019] IEHC 274, being:

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 to include reserved costs] said costs to be taxed in default of agreement;*

3. *The Applicants' application for a stay on the order is hereby refused.*

SUBMISSIONS

(I) THE HIGH COURT JUDGE'S OMISSIONS

The High Court Judge failed to reference and consider the contents of the Appellants' Statement of Grounds dated 15th April 2020 and Affidavit of Fact dated 5th May 2020. He also repeatedly misstated the factual background to the Appellants' application in the section headed 'Introduction' of Judgment 2020 IEHC 209.

The Judge failed to consider the evidence presented to him regarding the detrimental health, social and economic consequences of the Covid19 legislation. In asserting that 'the First Named Respondent took a number of measures to halt the spread of Covid19', Meenan J pre-judged the matter at hand by implying that these measures had been effective, when this assertion was unproven and contentious. The questions as to whether these measures were necessary, reasonable or justified were central to the application before the Court yet the Judge carried out no due diligence on them. In doing so, he would have established the Respondents' actions have no basis in science and have only caused catastrophic societal and economic harm.

The Judge also claimed that the Statement of Grounds filed by the Appellants did not state with any clarity what reliefs the Appellants were seeking, whereas the relief sought was made clear on the opening page (paragraph D): viz. a list of the legal instruments complained of, preceded by, 'AN ORDER OF CERTIORARI' declaring the enactment of the following null and void on the grounds of unconstitutionality.

We also submit that the learned Judge erred in fact and in law by failing to consider and reference in his Judgment the substantive submissions of the Appellants delivered orally on 5th and 6th May 2020 and furthermore misrepresented the contents of some such submissions.

The Judge repeatedly misconstrued and trivialised a contribution made orally to the Court concerning an alarming requirement under these measures for people to produce identification papers at police checkpoints in order to be able to move freely, a requirement never before countenanced in this Republic and one which gravely encroaches upon citizens' fundamental privacy rights and their freedom of movement. In his judgement, the Judge stated [para 77 (6)] that the Appellants '*gave unsubstantiated opinions and speeches, engaged in empty rhetoric and sought to draw an historic parallel with Nazi Germany*'. The statements made by the Appellants, both of whom are experienced journalists in the fields of law, science and medicine, were not in any way unsubstantiated and are fully supported by scientific studies, factual reports and medically qualified persons. Meenan J claimed there was a complete failure of the Appellants to put on Affidavit facts that if proven could support the view that the restrictions of rights as set out in the legislation are disproportionate. However, the disproportionality of various aspects of the legislation is referred to and elaborated on no less than 14 occasions in the Appellants' Statement of Grounds.

The Judge also erred in fact and 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 heard on 15th April 2020 when the legislation itself had been passed on 20th March 2020 and at that stage the Appellants were seeking to demonstrate unconstitutionality at the point of the enactment of said legislation.

The Judge also failed to consider the Appellants' arguments concerning the misuse of the Health Act 1947 and other instruments in the construction of an edifice of legislation unprecedented in its incursions upon human activity in Ireland.

In sharp contrast, the Judge accepted statistical predictions and non-peer review models which have since turned out to be grossly exaggerated, defective and bogus but were relied upon by the Respondents to justify the legislation.

He also ignored evidence provided by the Appellants of the highly dubious and unscientific manner in which Covid 19 cases and alleged Covid 19 related deaths are reported by the HSE, hospitals, doctors and coroners.

The Government has consistently made statements about the severity of the alleged pandemic which are false and misleading. At no point were the Respondents asked to produce any evidence by Meenan J that their 'lockdown' legislation had any basis in science or would save lives. No such research exists.

Despite the widescale attack on citizens' freedoms and rights, Meenan J dismissed all of this evidence showing deference to a Government whose catastrophic actions

against the Irish people have led to the virtual abolition of their most fundamental rights and freedoms.

(II) STATUTORY INSTRUMENTS ULTRA VIRES THE HEALTH ACT 1947 AND MISUSE OF THE PARENT ACT

The body of legislation framed by the interregnum Government in March 2020 amounts to a litany of unconstitutionality arising from the misuse of the parent legislation to usher in unprecedented and radical regulations that have no reasonable basis in said parent legislation and are completely at odds with the tenor and spirit of same.

The Health Acts 1947 and 1953 refer only to regulating the *spread* of infection: that is they cannot apply to anyone other than a person who has been diagnosed by a registered medical practitioner as having the relevant disease or likely to be a source of infection because of association with someone who had been diagnosed a having the disease. An uninfected person is incapable of 'spreading' a disease.

The Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020 is presented as an amendment of the Health Act 1947 whereas it sets out to do something unprecedented in the history of Irish lawmaking, these being measures directed not at containing and cocooning infected persons but subjecting the general population of healthy people to a regime of coercive restriction such as had previously not been contemplated in any context whatsoever.

While the Second Schedule of the 1947 Act provides a list of 'matters for which provision may be made in Regulations for the prevention and spread of infectious

disease' and allows for a requirement of 'adult persons' to be amenable to such Regulations, it is clear from the overall tenor of the Act and the context in which these provisions are listed, that this cannot be construed as a reference to entire populations, either of regions, counties or the country at large. Whereas it may not be so narrow as to entirely exclude non-infected persons, the overall context is one in which the probability of infection is at least 'suspected'.

It is submitted that for this Provision to be used to restrict and incarcerate the entire population, adults and children, even for relatively short periods, would be unconscionable to the drafters of the Act.

The measures introduced in March 2020 by the interregnum Government therefore amount to an egregious abuse of the 1947 Act, being entirely divergent from its content, tenor and spirit.

Additionally, the Health Act 1947 (Affected Areas) Order 2020 ostensibly pursuant to powers conferred on the Minister for Health by Section 31B of the Health Act 1947, declares that the State (being every area or region thereof) 'is an area where there is known or thought to be sustained human transmission of Covid-19'. As such, the Affected Areas Order 2020 in which the Minister has deemed every area within the State as an affected area and therefore placed the entirety of the Republic of Ireland itself as a unitary affected area is entirely ultra vires and contrary to the intent of the 1947 Act. Such Order/Statutory Instrument can only give effect to what is authorised by the Act and in particular Section 31A(1)(b) and therefore in terms of the legislation amending the 1947 Act itself the Minister has elected to act in an extreme and draconian manner and in excess of the powers afforded to him.

(III) NON-DECLARATION OF STATE OF EMERGENCY UNDER ARTICLE 28.3.3

The learned High Court Judge erred in law by failing to address the elision by the interregnum Government and the Oireachtas of the fact that the Constitution of Ireland itself provides for strictly limited circumstances by which said Constitution or any of its provisions may be suspended or abridged, circumstances provided for under Article 28 requiring conditions of 'war or armed rebellion' as set out by the Appellants in Paragraph 7 of their Statement of Grounds, Paragraph 15 of their joint Affidavit and oral submissions.

At paragraph 46 of his Judgment of 13th May 2020 the learned Judge states: "It was submitted that the respondents are not relying on the provisions of Article 28.3.3° so as to make the legislation immune from constitutional attack. Mr. McCann maintained that other emergencies arise from time to time, other than an emergency 'in time of war or armed rebellion', and that legislation to address such emergencies has to be constitutional."

However, notwithstanding the text of the Preamble to both parent Acts, the subject of the Appellants' challenge, referring repeatedly to an "Emergency" as the basis for the introduction of the legislation, Meenan J inexplicably failed to rule on such contention as set forth by Mr McCann SC for the Respondents.

The Appellants submit the State has misled the public by the text of such Preambles and the repeated use of term 'Emergency' in such Acts into believing that a State of Emergency pertains, when no such declaration has occurred and no such declaration could have been constitutional in view of the failure of the alleged Covid-19 'pandemic' to meet the requirements of Article 28.3.3.

This wording of Article 28:3:3 dates from 1939, when it was inserted as the First Amendment, refining the constitutional text following a lengthy public and political debate concerning the circumstances in which a State of Emergency might be declared in advance of the impending conflict since known as World War II. It is clear from the facts of the amendment process that it was the intention of the drafters that Article 28.3.3 not be extended to contexts other than those involving war or armed rebellion, the background to this being set out in *The Origins of the Irish Constitution, 1928-1941*, by Gerard Hogan, pp 628-667.

In his Judgement on the case of Dellway Invesments & Ors v. NAMA & Ors [2011] Hardiman J. (paras unnumbered) states:

'*Our Constitution makes specific provision for "war or armed rebellion". It is not for the Courts to extend those provisions to a situation which is not one of war or armed rebellion. That would require a decision of the people in a referendum, if they thought it necessary or prudent to confer such unreviewable powers on the State.*'

There is accordingly no mechanism, in the Constitution or otherwise, by which the panoply of blanket, concurrent suspensions of personal and civic freedoms introduced in March 2020 under the cover of a viral threat may be justified in legal or constitutional terms.

(IV) PUBLIC ACCESS TO COURT HEARINGS

Article 34:1 of the Constitution of Ireland provides that: 'Justice shall be administered in courts established by law by judges appointed in the manner provided by this constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.'

Walsh J. in re R Ltd. [1989] said that '*[t]he actual presence of the public is never necessary but the administration of justice in public does require that the doors of the court must be open so that members of the general public may come for themselves and see that justice is done.*'

This implies a particular public place, a courtroom, which is provided with adequate seating to enable a reasonable number of such people to attend a hearing, thereby to witness proceedings, relay the content of such proceedings to other interested persons, and, in the event of a dispute or controversy, function as informal witnesses within the general population concerning what transpired in court. It is clear that the reference to 'special and limited cases as may be prescribed by law' has a clear meaning, which has already been adopted in precedent whereby court hearings in certain types of cases — rape case, for example, and family law — are conducted *in camera* for reasonable, transparent and generally accepted reasons.

It is submitted also that the provisions of Article 34:1 are not met by provision for "virtual" or "remote" hearings, these being rendered possible by electronic means which are by their nature exclusive of certain categories of citizen, for example some elderly people, people of limited means, and people who object to the virtualisation of public processes on a philosophical basis.

It is submitted that the learned Judge misstated 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. Meenan J 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/or a misapprehension of the true facts.

In fact, other than the parties to the application and certain members of the media, the learned Judge disbarred all members of the public who wished to attend the hearings from access to the Court and subsequently withheld his direction to disbar the public from such hearings from his delivered Judgment.

The Judge then went on to claim that most members of the general public acquire their knowledge of court cases through the media which is entirely irrelevant. Article 34:1 does not specify that the public be given 'knowledge' of legal hearings via the media but makes clear that justice is to be administered 'in public'. Since no law has been enacted providing for the closure to the public of hearings such as those in the present case, any hearing which takes or has taken place in the absence of members of the public, when some members of the public have clearly indicated their desire to be present, must be deemed invalid by reason of its unconstitutionality under the provisions of Article 34.1.

(V) ABROGATION OF FUNDAMENTAL RIGHTS AND PROPORTIONALITY

Many of the rights in the Constitution of Ireland are 'inalienable' and 'imprescriptible'. This does not mean that these rights are necessarily always to be deemed absolute: what it means is that they are set at the highest value so as to enjoy the highest possible level of legal protection which might realistically be afforded in a modern society.

It is true that it is open to the State, by permission of the People, to curtail in certain justifying circumstances such normatively constitutionally protected rights. But the robustness and repetitiveness of the language used in the key articles — 40 to 44 incl. — indicates the intention of the drafters of the Constitution that the indefeasibility of many of these provisions is to be taken literally.

In *Gorry & Anor v. The Minister for Justice & Equality & Ors [2020]* two separate judgments - McKechnie J. and O'Donnell J. - deal in detail with several aspects of this question, clearly concluding that matters as general as those identified by such concepts as the 'common good' are not sufficient to overcome the all but sacrosanct nature of certain individual freedoms.

In the same case, O'Donnell J. speaks of the "balancing act" requiring to be undertaken by the Minister in assessing his responsibility to respecting the constitutional rights of the citizen (in that case family rights under Article 41) while also discharging his official responsibilities under the Constitution and the law.

On inalienable, imprescriptible and indefeasible rights he stated [para 10 (iii)] that:

"*These words are, however, an indicator that the rights protected by Article 41.1.1 should enjoy the highest possible legal protection which might realistically be afforded in a modern society*." These rights, he states, [Para 10, (vii)] can only be subject to restriction if there is "*compelling justification*". O'Donnell J. goes on, paras 14 to 17, to reiterate the point made by McKechnie J. concerning the necessity to interpret with a high degree of literalness the language of the Constitution and that it must "*be established that the restriction of the right is no more than is strictly necessary to achieve that object*".

It is submitted that in March 2020, the interregnum Government, in depriving the entire population of their individual and fundamental rights and freedoms, did not extend sufficient weight to balancing those rights with the 'common good' as advanced as the justification for the abrogations of the Constitution then imposed.

The Court has been presented with no persuasive evidence that the necessary balancing exercise was carried out. No evidence of a cost/benefit analysis was produced, no calculus of the economic costs of the lockdown, no estimates of the probable adverse health consequences and deaths arising from the proposed measures themselves —in short, no due diligence of any kind.

It is submitted further that no consideration was given by the learned Judge to whether the restriction of rights and freedoms was no more than is strictly necessary to achieve the stated objectives of the Interregnum Government, and that no credible or sincere measures were put in place to ensure that the restrictive measures might be terminated at the earliest possible time.

(VI) THE TEST OF ARGUABILITY CONCERNING UNCONSTITUTIONALITY

In all the circumstances of the case, the learned High Court Judge erred in fact and in law by holding that the Appellants had not met the threshold of an arguable case and refused leave to issue Judicial Review proceedings notwithstanding holding that the restrictions set out in the legislation the subject of the Appellants' application undoubtedly intrude on constitutional rights and freedoms.

At paragraph 52 of his Judgment in reference to Article 41 "The Family" the learned Judge stated:

"There is no doubt but that the restrictions' [set out in the legislation the subject of the Appellants' application] *interfere with normal family life."*

As per Costello J in *PH -v- John Murphy & Sons Ltd* [1987] IR 621, further cited by McKechnie J in *Gorry -v- Minister for Equality and Law Reform* [2020], para 160:

"The guarantee which the State gives in Article 41.1.2 is a guarantee to protect the Family 'in its constitution and authority'....It follows that the rights which are conferred by Article 41.1.2 are (a) the right to protection from legislation which attacks or impairs the constitution or the authority of the Family and (b) the right to protection from the deliberate acts of State officials which attack or impair the constitution or authority of the Family".

The Appellants submit that, on the basis outlined, the test of threshold of an arguable case in an application for leave to bring Judicial Review proceedings has already been met. This test is set out in *G ~~v~~ DPP (1994)* and constitutes a low threshold: that there are arguments in favour of the case which the proposed applicant wishes to put forward which have some prospect of success.

G -v- DPP was recently reiterated as the test for the granting of leave in Judicial Review applications by Simons J in *Ryanair -v- An Taoiseach* [2020] IEHC 461 in which leave was granted to the applicants to challenge the Health Act 1947 (Section 31A – Temporary Requirements) (Covid-19 Passenger Locator Form) Regulations 2020 enacted pursuant to the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020 the very same Act being the subject of the Appellants within appeal. In such proceedings Simons J. referred merely to an "arguable case" as certifying the passing of the threshold without substantively referring to any arguments or evidence presented by Ryanair as to their chances of success at a full hearing. It follows inexorably that the Appellants should be granted leave to challenge the legislation the subject of the within proceedings.

In the High Court hearing of the within case, in ruling that the Appellants had failed to meet the threshold in *G v. DPP*, the learned Judge (para 27) cited Charleton J in the Supreme Court judgement of *Esme v. Minister for Justice and Law Reform* [2015]

IESC 26. However, the learned Judge failed to cite Clarke J in the same *Esme* Judgment. Referring to the threshold of an "arguable case" in a Judicial Review application, Clarke J stated that there is no difference between an "arguable case" and a *prima facie* or "statable" case:

"Arguable, in that context, means that there are arguments in favour of the case, which the proposed applicant wishes to put forward, which have some prospect of success."

Eight months after their original enactment, the impact of the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020 and the Emergency Measures in the Public Interest (Covid-19) Act 2020 and successive Regulations thereto is now widely manifest. The original Act which had a "sunset clause" of 9th November 2020 in place when the learned Judge delivered his Judgment — a matter frequently raised by the Judge as a mitigating factor with regard to incursions on fundamental rights — has now been renewed until June 9th 2021, following a Dáil vote on October 22nd 2020.

A direct effect of the Acts and Regulations is the blanket, contemporaneous suspension of the core fundamental rights guaranteed by the Constitution, often with at least the appearance of arbitrariness. As set out by the Appellants in their Statement of Grounds at paragraphs 22 to 25, the provisions of the Health Act 1947 (Section 31A Temporary Restrictions) (Covid 19) Regulations 2020 directly and contemporaneously interfere with citizens' Fundamental Constitutional Rights as follows:

<u>Under Article 40</u>: by prohibiting all citizens from leaving their homes and travelling around the country without offering on demand by a member of An Garda Siochána a 'reasonable excuse'; by prohibiting the right to travel freely throughout the State and outside the State; by prohibiting the right to associate with family members; by prohibiting the right to engage in peaceful assembly; by exposing citizens to the risk

of an indefinite isolation and detention at the direction of persons unspecified despite not being infected with the virus known as Sars-Cov-2, otherwise referred to in terms of the allegedly consequent disease, Covid-19.

Under Article 41: by prohibiting the natural and inalienable right to associate with family and in the case of vulnerable persons residing in hospitals and/or care homes, directly interfering with the marital relationship to which they may be a party by preventing and impeding personal access between spouses.

Under Article 44: by prohibiting the holding of religious services and prohibiting attendance in congregation at such services and the convening of any such religious service to attract criminal penalties.

Under Article 45.2: by directing the closure of businesses and commercial enterprises deemed "non-essential" unilaterally in the opinion of the Minister with the inevitable negative financial impact on business owners and employees and the right to earn a livelihood; restricting events convened either on a private basis (such as a social gathering) or a commercial basis (such as a festival or concert) unilaterally at the direction of the Minister.

In addition, the legislation offends against the unenumerated right to bodily integrity by virtue of the subsequent enactment of the Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) (Face Coverings on Public Transport) Regulations 2020 mandating the wearing of face coverings on public transport and the Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) (Face Coverings in Certain Premises and Businesses) Regulations 2020 mandating the wearing of face coverings in certain premises directly repugnant to the Supreme

Court ruling in *In Re a Ward of Court* (withholding medical treatment) (No. 2) [1996] 2 IR 79.

No scientific studies exist to support the wearing of face coverings to stop the spread of viruses while voluminous scientific evidence concludes that face masks are deleterious to human health and can cause oxygen deprivation, lung disease and cancer.

Since initiating their application in Court in April 2020, the Appellants have been receiving communications from citizens whose Fundamental Constitutional Rights have been directly attacked by the practical application of the penal provisions of the legislation by members of An Garda Siochána at 'Covid checkpoints', on public transport by bus and rail drivers and by managers and personnel in supermarkets and retail outlets.

In some instances, members of An Garda Siochána have cited the Public Order Act as justification for an arrest pursuant to a citizen politely asserting their Fundamental Constitutional Rights and the unconstitutional encroachment of the Covid legislation on same even though no such offense could possibly have arisen or been suspected. The arbitrary and discriminatory nature of the 'Covid' legislation facilitates these excesses of powers. One man, a foreign national resident in the State on a routine car journey, recorded a 20-minute video which shows a Garda checkpoint enacted pursuant to the "Covid" Regulations and two Gardai bullying and berating him and levying an unsubstantiated insinuation that he was suffering from a mental illness. This witness account and many others will be provided as evidence by the Appellants' as to the terrifying, draconian and utterly unconstitutional attack on citizens' liberties by the state.

The Appellants have also received communications from people who have been arrested for merely handing out leaflets on the pretext of a breach of the "Covid" Regulations later having the accusation altered to a Public Order offence.

A further report is within the remit of the Appellants concerning the breaking up pursuant to the "Covid" Regulations of a Mass in a Longford barn, which constitutes a direct interference with the right to practice religion in congregation as recognised by Article 44.

The impact of the subject Acts and Regulations on rights set out by the Constitution is in a manner akin to that affirmed by Clarke J. in *Esme* but on a mass scale and furthermore involves the concurrent suspension of <u>all</u> core Fundamental Rights affirmed by the Constitution.

Despite this, no evidence has been presented by the Respondents, nor requested by the High Court Judge, that the Minister took any steps prior to presenting the Acts before the Houses of the Oireachtas and signed successive Regulations thereto to examine the potential impact and fallout whether medical, psychological and/or economic of the legislation and its blanket suspension of Constitutional rights on all persons resident in the State and to whom it applies.

In *Meadows v. Minister for Justice, Equality and Law Reform, (2010) IESC3* Murray J stated:

> "*Judicial review is concerned with the Courts exercising their constitutional duty to ensure that powers, governmental and administrative, are exercised within the law and the Constitution and, inter alia, in a manner consistent with the rights of individuals affected*

by them.....In examining the compatibility of a statutory provision with the provisions of the Constitution the Court may subject it to a proportionality test. Judicial review of legislation by reference to the principle of proportionality has been exercised by this Court without trespassing on a core constitutional function of the Oireachtas to decide policy and to legislate accordingly."

As such, it is inexorable that an "arguable case" exists for the legislation to be examined for its constitutionality under the terms set out in *G v. DPP,* Clarke J in *Esme v. The Minister for Justice,* Clarke J; in *S. and Ors. v. Minister for Justice and Equality;* in *Ryanair v. An Taoiseach*; and *Meadows v. Minister for Justice* with no advance burden on the Appellants at preliminary leave stage to evidentially succeed in that arguable case in a full hearing.

(VII) THE PROPORTIONALITY QUESTION

The learned High Court Judge erred in fact and in law by advancing that there was a 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.

At paragraph 54, the learned Judge ruled: "*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."*

It is submitted that the Statement of Grounds and Affidavit of the Appellants provided adequate facts and argument, including the facts just cited from the learned Judge's judgment, to enable a full examination of the proportionality question, but that the learned Judge failed to apply an adequate test of proportionality whereby the

encroachment on citizens' Fundamental Rights by the legislation of 20th March 2020 and 27th March 2020 might have been scrutinised for unconstitutionality.

Despite an acknowledgement by the learned Judge that the measures had indeed impacted on normal family life as per paragraph 52 of his Judgment, the consideration of the proportionality of said measures was applied on the basis of a total of 268 cases of Covid-19 in the Republic of Ireland at the time when the legislation complained of was being prepared for enactment on 16th March, this figure including just two deaths.

That there is not now, nor was there then, any factual justification for the measures proposed and implemented at the instigation of the interregnum Government. This is readily confirmable by comparision to previous 'pandemics' and responses to the patterns of regular seasonal influenza.

In respect of the seasonal flu, the HSE's own website states '*influenza can be a very serious and sometimes deadly disease, with potentially 1,000 flu related deaths in Ireland during a severe flu season*.' This estimate is, at the time of writing, on a par with the settled figures for excess deaths attributable to Covid-19 in the months immediately after the first death on March 11th 2020, and markedly higher if compared with the number of deaths attributed to Covid-19 and no other condition.

Yet, no restrictions or encroachments on citizens' Fundamental Constitutional Rights at all, let alone measures comparable to the Acts and Regulations the subject of the Appellants' application, were enacted by the Oireachtas in response to such community viral transmissions. Indeed, it had never before been considered that an appropriate response to influenza, or indeed any of the threatened "pandemics" such as H1N1, might have necessitated the suspension of economic and human activities in an unscientific and discriminary fashion and to withhold or abridge fundamental, inalienable and imprescriptible freedoms guaranteed by the Constitution.

The learned Judge asserted (para 54): "*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."

No onus rests on the Appellants to furnish any updated figures with respect to Covid-19 and the learned Judge erred in so ruling. The test of proportionality must relate to the clinical information and guidance within the Respondents' remit at the point at which the legislation was drafted and set before the Oireachtas, being the ECDC Rapid Risk Assessment exhibited to the Affidavit of Bernie Ryan dated 2nd May 2020 for the First Named Respondents as Exhibit BR1 Tab E, and the question: whether or not the legislation drafted in response has a disproportionate impact on citizens' Fundamental Constitutional Rights. The learned Judge made no attempt to apply same.

It has been established beyond doubt by numerous scientists that the PCR test used to test for potential infections is wholly unreliable, unfit for purpose and has an 80% rate of false positive. Many scientists have emerged to confirm that no virus conforming to the unique personality attributed to SARS-CoV-2 can be identified in isolation by the PCR test commonly in use in Ireland under the auspices of the HSE. It is also the case that both the Center for Disease and Prevention Control (CDC) in the United States and the UK Department of Health have stated that no isolates of the Sars-Cov-2 "Covid 19" virus, nor any publications confirming such isolation, are in existence. The Appellants will evidence these contentions before the Court at full hearing.

Statistics published by the HSE in respect of the alleged 1,375 deaths by 5th and 6th of May as asserted by the Judge reveals a very different picture to that asserted by the Respondents. An examination of excess deaths in the period March-July 2020 by the CSO (Central Statistics Office) reveals only 76 deaths are attributable to Covid-19 and with a median age of 83, which is on a par with average life expectancy in Ireland. Again, the learned Judge made no demand of the Respondents to provide any detailed clinical information in respect of the 1,375 statistically claimed deaths, despite the Respondents being in the possession of or having access to such information.

From the beginning of the present crisis, questions have been raised on a worldwide basis concerning the method of certifying deaths alleged to have occurred from

Covid-19. At the final session of the Oireachtas, Special Committee on Covid-19 on September 29th 2020, the Chairman Mr. Michael McNamara TD highlighted this matter whilst questioning the Interim Director of Ireland's Health Protection Surveillance Centre, and member of NPHET, Dr. John Cuddihy. Mr McNamara inquired of Dr Cuddihy whether, if someone was hospitalized with a broken leg but then tested and found to be a positive, would that person be counted among the Covid-19 hospitalization numbers? Dr Cuddihy replied: 'They are included in the surveillance statistics- yeah.'

NPHET also confirmed that an individual who dies following a heart attack, stroke or from falling off the roof of a building is recorded as a Covid death if they test positive.

Accordingly, it is submitted that the learned Judge entirely failed to apply the proportionality test as per Costello J. in *Heaney v. Ireland [*1994] 3 IR 593 and Denham J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3 and in the neighbouring jurisdiction the proportionality test of Lord Sumption in *Bank Mellat v HMT (No 2)* [2013] UKSC 39.

By virtue of this failure, the Appellants' arguable case that the Acts and Regulations disproportionately impact on citizens' Fundamental Constitutional Rights remained unaddressed by the Court.

(VIII) JUSTICIABILITY OF OIREACHTAS CONDUCT

It is submitted that the learned High Court Judge erred in ruling that the matters raised by the Appellants regarding the conduct of the Oireachtas in passing the complained of legislation were non-justiciable.

In his Judgement of May 13th 2020 at paragraph 70, the learned Judge stated:

"The Articles of the Constitution referred to and the authorities relied on make it very clear that the complaints made by the applicants concerning the actions of the Ceann Comhairle and the procedure followed by the Dáil and Seanad in passing this legislation are non-justiciable. For a court to embark on the hearing of such complaints would be a clear breach of the principle of separation of powers."

However, Article 34.4.5 of the Constitution provides that the Supreme Court should function as the final arbiter in interpreting the Constitution of Ireland. Article 34.3.2 expressly permits the courts to review any law, in order to ascertain whether it is in conformity with the Constitution. Subordinate legislation and administrative decisions may also be subject to constitutional scrutiny**.**

Articles 15.8 to Article 15.15 govern the administrative workings of the Houses of the Oireachtas, including the drafting of rules and standing orders. As the Constitution expressly permits the Courts to review any law passed by the Houses of the Oireachtas to determine its compatability with or repugnancy to the Constitution it is impossible to reason how those same Courts would not have jurisdiction to hear applications concerning breaches of the Standing Orders as prescribed by Article 15.10 where it is asserted that those breaches gave rise to the passage of ostensibly unconstitutional legislation. This was confirmed by Fennelly J in *Callely v Moylon & Ors* (SC Appeal No: 069/2011) who said:

"There is no bar within the terms of Article 15.10 to the justiciability of statutory procedures"

and Geoghegan J in *Maguire v Ardagh* [SC 2001 329 JR]:

"First of all there is the question of justiciability. While it is true that out of respect for the separation of powers the courts will not interfere with the internal operations of the orders and rules of the Houses in respect of their own members, the non-justiciability principle stops there. If there is some essential procedural step which a house of the Oireachtas or a committee thereof has to take before rights of an outsider, that is to say a non-member of the House can be affected, then at the suit of that outsider the courts can give relief if that essential step is not taken. Broadly speaking, that is the view of the Divisional Court and I agree with it."

All acts and decisions that entail the exercise of legal powers are subject to the principle of legality which states that public bodies are allowed to do whatever the law authorises them to do, and no more than that. Therefore, and by definition, all decisions that entail exercising legal powers are justiciable. In short, the question of justiciability cannot precede and be disposed of before the question of constitutionality.

If the Court finds that unconstitutionality has occurred, and the learned Judge in his Judgment has acknowledged same, then the manner in which that unconstitutionality arises must be amenable to judicial scrutiny.

(IX) MATTERS OF QUESTIONABLE CONSTITUTIONALITY AND THE OIREACHTAS

It is submitted that the learned High Court Judge erred in fact and in law by ruling that no arguable case has been made against the Oireachtas.

Referring to the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020, the Appellants set out at paragraphs 27 and 28 of their originating Statement of Grounds that the Bill was passed by the 25th Seanad being the outgoing Seanad elected in concurrence with the election of the 32nd Dáil (such Dáil being dissolved by President Michael D Higgins on 14th January 2020) and the 33rd Dáil from which the Bill was transmitted on Thursday 19th March. The learned Judge states that no case has been made that the Dáil and Seanad that passed this legislation were not validly constituted.

The learned Judge dismissed as having no legal basis the document exhibited by the Appellants which the Oireachtas Library and Research Service Division posted on the Oireachtas website itself which stated that, during the period of an interregnum administration, laws may be passed only by the newly elected Houses — that is, after the election of a new Seanad has been completed. This election occurred following an election held on March 30th and 31st 2020, subsequent to the passage of the legislation. This apparent regulatory provision provokes questions concerning whether a Seanad without the 11 nominees of a newly elected Taoiseach can be properly constituted, since it is likely that some members of an outgoing Seanad will have been elected to the Dáil.

These facts provide substantiation for the existence of a regulation to the effect that only the newly elected incoming Houses can pass legislation, since it is not possible for a person to be a member of both Houses as per Article 15.14.

The Appellants submit that from the membership of the outgoing 25th Seanad, eight members had been elected to the incoming 33rd Dail. This means the 25th Seanad that

passed the Acts the subject of the within application following their passage by the 33rd Dáil had already been reduced by eight members.

Nothing in the Constitution supports a reduced numerical composition of the Seanad nor its being afforded the power to pass legislation in such abridged form. This ineluctably implies that legislation having been transmitted from a newly elected Dáil cannot be passed by an ongoing Seanad pending an election, and can only be validly passed by two newly elected Houses. The learned Judge erred in his ruling accordingly.

It is a notable aspect of the leave hearings in this case that none of the primary named Respondents have provided, or been required to provide, any evidence on Affidavit concerning any of the disputed matters that were ultimately decided by the learned Judge. This peculiarity unleashed a raft of paradoxical conditions, under which it was impossible for the learned Judge to adjudicate fairly and thoroughly on the core issues.

There is a contradiction, for example, in the fact that the learned Judge found that matters pertaining to the actions of the Oireachtas were non-justiciable, whereas he was not in any event in a position to make a judgment on the constitutionality or otherwise of the complained of legislation on account of the aforementioned failure to inquire into the cicrumstances in which said legislation was enacted.

Had the leave application been permitted to pursue a normative course, this might not have proved problematic, since the substantive issues might thereby have been left open pending a full Judicial Review. But, in circumstances where no full examination was conducted, in making a ruling that (a) the issues were non-justiciable, and (b) the Appellants had not advanced a statable case, the judge both contradicted himself and pre-judged the issues relating to the conduct of the passage of the complained of legislation through the Oireachtas.

It follows from the above that the learned Judge erred in failing adequately to explore the assertions of unconstitutionality, accompanied by evidence, made by the Appellants. In particular it was not open to the learned Judge to decide, without hearing appropriate evidence, that following the General Election of February 8th

2020 and the newly elected Dáil sitting on February 20th 2020 failing to elect a new Taoiseach, that the Taoiseach resigned, setting properly in train the provisions of Article 28.11.1.

For example, no evidence had been presented by the Respondents or Notice Parties to the Court that Leo Varadkar placed his resignation in the hands of President Michael D. Higgins at any point following February 20th 2020 in accordance with the provisions of Article 28.10. It is submitted that no evidence is publicly available either by way of Government publication or press release or any mainstream media publication to this effect to the present date. This contrasts with the publication by the Irish Government News Service *Merrion Street* on 13th June 2017 that "*Taoiseach Enda Kenny this afternoon placed his resignation in the hands of the President, Michael D Higgins, in accordance with Article 28.9.1° of the Constitution"* which remains to the date of these within Submissions the latest and most recent Government press release entitled "Resignation of the Taoiseach".

Proceeding on such an unverified assumption without requiring from Counsel for the Respondents and Notice Parties that they produce evidence on Affidavit or in Submissions in confirmation that the Taoiseach tendered his resignation in accordance with his requirement to do so pursuant to the provisions of Article 28.10, the learned Judge then consequentially misstates and mistranscribes the content of Article 28.11 as follows; *"Article 28.11 of the Constitution makes clear that the Government remains in office until their successors have been appointed. Further, "the Taoiseach and other members of the Government shall continue to carry on their duties"*

"... It cannot be doubted 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" and proceeds to erroneously rule on such mistranscription.

On the face of things, it might appear that the elected composition in place in the wake of the February 2020 General Election was such as not to be foreseen by the drafters of the Constitution. It is submitted, however, that it is inconceivable that the drafters overlooked such a possibility, nor is it open to the Courts to decide simply that they paid insufficient attention to this question when drafting the constitutional texts. The learned Judge failed to examine the

text of the Constitution to establish if or where disincentives may have been inserted against the possibility of an outgoing administration without an electoral mandate holding office indefinitely either by its own volition and/or coercion and introducing legislation without possibility of challenge, and, it is submitted, failed correctly to interpret the variations of vocabulary used in respects of the "powers", "functions" and "duties" of ministers, or in particular the intent and meaning of the term "duties" as set out in Article 28.11 1°.

On the face of things, there appears to be a contradiction in the wordings of various provisions of Article 28, which requires to be reconciled before any decision on these matters can be arrived at. This relates to an apparent conflict between Article 28. 11 1°, which provides that the Taoiseach and other members of the (outgoing) Government "shall continue to carry on their duties until their successors shall have been appointed" and Article 28.7.1° and Article 28.7. 2°, which require that all members of the Government must be either members of Dáil Éireann or (a maximum of two) of Seanad Éireann.

This apparent contradiction cannot be resolved on a superficial reading of these various provisions. If it is necessary that members of the Government be members of Dáil Éireann or Seanad Éireann, it does not at the same time appear possible to ensure that the Taoiseach and all other members of the Government *"shall continue to carry on their duties until their successors shall have been appointed.*"

If a minister has failed to be re-elected, and is therefore no longer a member of the Dáil or Seanad, he or she cannot be regarded as a member of the Government.

The possibility of clarity, however, is found in the very opening provision of Article 28 itself which states:

1 The Government shall consist of not less than seven and not more than fifteen members who shall be appointed by the President in accordance with the provisions of this Constitution.

It is submitted that Article 28.1 therefore facilitates the continuation of Government in the event of a Government Minister losing his or her Dail or Seanad seat — by facilitating a reduced Government complement of seven Ministers. However on the passage of the legislation the subject of the Appellants' application, three former ministers — Ministers Shane Ross, Katherine Zappone and Regina Doherty — who had lost their Dail seats in the General Election of February 2020 and were not members of Dail Eireann or Seanad Éireann on the dates of passage of the complained of legislation through the Houses of the Oireachtas, continued to remain as members of Government in direct violation of the provisions of Article 28.1, Article 28.11.1 and Article 28.7.2, and accordingly such Government was not operating in accordance with the provisions of the Constitution, such three Government posts being retained illegitimately. As such the passage of the legislation the subject of the Appellants' leave application is, in the submission of the Appellants, consequently rendered void. And it it further submitted that, at the very least, this matter ought to have been considered and ruled upon by the learned Judge but it was not.

(X) EUROPEAN CONVENTION ON HUMAN RIGHTS

The learned High Court Judge erred by ruling that (i) 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 (ii) that the Charter of Fundamental Rights and/or other EU law does not apply to domestic law.

The European Convention on Human Rights Act 2003 requires the Courts, as far as practicable, to interpret legislation in line with the European Convention on Human Rights. Section 5 of the Act grants to the Courts the power to make a declaration that a statutory provision or common law rule is incompatible with the Convention. Such a declaration does not render the law in question invalid, rather the Taoiseach is obliged to bring any such declaration to the attention of both Dáil Éireann and Seanad Éireann and a litigant who has been granted a declaration of incompatibility may receive monetary compensation in accordance with the principles of just satisfaction under the Convention's Article 41. The Judge however failed to make

any assessment of proportionality of the ostensible incompatibility of the provisions of the Acts and Regulations the subject of the Appellants application with the rights affirmed by the Articles of the Convention as set out by the Appellants in their Statement of Grounds.

COSTS

- There is and was an overwhelming public interest in having these matters determined in substantive proceedings given that they affect every citizen of the nation.

- There was sufficient material before the court to grant leave.

- The decision to adjourn and put the respondent on notice was made by the Judge and was not sought by the Appellants, who had applied to the Court on the usual ex parte basis under Order 84.

- That decision was unnecessary. If the Appellants are correct, then leave should have been granted. If the Judge was correct as to the reasons for refusing leave, then it should have been unnecessary to put the Respondents on notice. Either way the order for costs is unwarranted and unjustifiable.

- In circumstances whereby this was a leave application to which the Respondents were joined against the wishes of the Applicants by judicial direction, it is unreasonable that the Applicants be held accountable for the Respondents' costs, for such an approach would surely risk creating the impression that the Courts were assuming a role in seeking to deter citizens from pursuing their Constitutional right to litigate matters of public interest and of urgent and intimate concern to themselves and others, and accordingly be construable as an attempt to deny citizens access to the Courts, or at least to be so interpreted by citizens.

- The purported failure by the unrepresented Appellants to engage with the legal arguments and evidence of the Respondents does not, even if accurate, which is disputed, provide a proper ground for a costs order. It is clear that the Judge set in train an informal and unannounced quasi-hybrid hearing without informing the Appellants that this is what he was doing. It is clear that the Appellants had put

forward a number of substantive prima facie arguments which merited the immediate granting of leave for Judicial Review, and which had every chance of ultimately succeeding at full hearing.

Further, the Applicants/Appellants were unrepresented. There was no reciprocal risk of an order for costs being made against the Respondents, which is unjust on its face. Furthermore, the Applicants, who represented themselves, did not seek restitution by way of damages as a relief but an order of the Court that the Acts and Statutory Instruments were repugnant to the Constitution. The Appellants stood to make no pecuniary gain from the outcome of the case, but instead had undertaken to bear their own costs and expenses in pursuing a matter of public interests which, at a time of the gravest risk to fundamental rights and freedoms, a responsibility no other groups or individuals had stepped forward to assume.

- The overwhelming public interest in having these matters considered in open court was such that the discretion to make an order for costs against the Appellants was wrongly exercised. The application for leave brought by the Applicants overwhelmingly fits the definition and meets the standard of an action taken in the public interest. The provisions of the Acts and Statutory Instruments directly affect all persons whose habitual residence is within the State and the exercise of their personal constitutional rights and as such the application brought by the Applicants meets the definition of 'public interest' cases, being 'those which raise a serious issue which affects or may affect the public generally or a section of it' (Justice and Public Law Project, 'Matter of Public Interest: Reforming the Law and Practice on Interventions in the Public Interest Cases" (London, 1996, pages 4-5). Where the substance of the action is of such immediate public concern and effect no order for costs should have been made against the Applicant.

CONCLUSION

In all the circumstances of the case as set out herein, it is submitted that the Judgments of Meenan J delivered 13th May 2020 and 4th June 2020 and the Order of 3rd July 2020 should be reversed and the relief sought is an Order by way of Appeal setting aside and reversing the Judgment and Orders of the High Court.

Gemma O'Doherty and John Waters
Appellants in Person
November 20th 2020

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