THE COURT OF APPEAL
UNAPPROVED NO FURTHER REDACTION NEEDED

Neutral Citation Number [2020] IECA 319
[2019 352]

Edwards J.
Ní Raifeartaigh J.
Collins J.

BETWEEN/

DARRAGH GALVIN

APPELLANT

- AND-

DIRECTOR OF PUBLIC PROSECUTIONS, THE ATTORNEY GENERAL & IRELAND

RESPONDENTS

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 19th day of November, 2020

Introduction

1. This is an appeal in respect of a High Court decision to convert the form of the applicant's proceedings from a judicial review to a plenary action. The overall context is that the applicant stands charged with an offence under finance legislation and wishes to challenge its constitutionality. Among his grounds of complaint are that the legislation fails to provide a defence to a defendant even if he establishes that he did not know what he was doing was wrong; he also complains that a judge imposing sentence would not have the option of applying the Probation Act upon conviction even if satisfied that the defendant did not know he was doing something wrong at the time of the offence. There are other grounds of challenge also, but these two feature prominently. The appellant commenced his

constitutional challenge by way of judicial review proceedings, and his complaint in this appeal concerns the decision of the High Court to convert the proceedings to a plenary action on foot of a motion issued by the respondents, after the judge heard the respondents' submission that they wished to cross-examine the applicant.

Background facts

2. The appellant was charged with the offence of offering for sale a specified tobacco product otherwise than in a pack which a valid tax stamp was affixed, contrary to s.78(3) and (5) of the Finance Act 2005 as amended. A summons charging the applicant with the offence issued against him on the 20 September 2017.

3. The appellant's verifying affidavit says that in 2016 he asked a friend who was travelling to Turkey to buy fifteen packets of a certain type of tobacco. He says that when his friend returned from Turkey and gave him the tobacco, he decided it was not to his liking and decided to dispose of the remaining fourteen packets by way of selling them. He said that on the 16 November 2018 he placed an advertisement in an online Facebook group called "Ballyfermot, buy, sell or swap goods". His attempted sale of the goods was intercepted by a customs officer posing as a customer. In his affidavit in these proceedings, he says: "I voluntarily accompanied them to their vehicle and answered all of their questions. I explained how it arose that I was selling the tobacco products. I told them that I didn't realise that I was doing anything wrong and so confirm in this affidavit."

4. At the time of the offence the appellant was unemployed. Subsequently, he started a job with An Post, and he is currently employed as a postal operative and from time to time as a postman delivering parcels. He has no previous convictions. He averred on affidavit that he was very concerned that An Post would terminate his employment if he received a conviction of an offence of this nature.

5. By these proceedings, the applicant challenges the constitutionality of the provision under which he was prosecuted (s.78(3) of the Finance Act 2005 as amended – offering for sale specified tobacco products otherwise than in a pack to which a tax stamp is affixed) and/or its compatibility with the European Convention on Human Rights. He also brings a challenge to s.126(6) of the Finance Act 2001, which removes from the trial judge the option of applying the provisions of s.1 of the Probation of Offenders Act 1907 in circumstances where a person is found guilty of the offence in question. He also sought prohibition of his prosecution.

6. After some initial dates in the District Court, a hearing date in respect of the criminal charge was set down for the 21 February 2018. Leave to bring judicial review proceedings was obtained on the 19 February 2018. No statement of opposition has yet been filed. The respondents brought a motion seeking the reliefs set out below, as a result of which the High Court made an order converting the proceedings to plenary proceedings. It is that order which is under appeal.

The relief sought by the appellant in the substantive proceedings and the grounds identified in respect of those reliefs

7. The primary reliefs sought by the appellant are as follows:

1. A declaration that the provisions of section 78(3) of the Finance Act 2005 as amended are inconsistent with the Constitution, in particular Articles 38.1, 40.4.1, 40.1, 40.3 and 40.6.1 thereof;
2. A declaration that the provisions of section 78(3) of the Finance Act 2005 as amended are incompatible with the European Convention on Human Rights, in particular articles 6, 7 and 10 thereof;

3. A declaration that the provisions of section 126 of the Finance Act 2001 are inconsistent with the Constitution, in particular Articles 6, 34, 37 and 40.3 thereof and/or Articles 6 and 8 of the ECHR;
4. A declaration that the provisions of section 78(3) of the Finance Act 2005 as amended are incompatible with the European Convention on Human Rights, in particular article 6 thereof, interpreted in light of article 1, Part 1 of the European Social Charter;
5. A declaration that the provisions of section 78(3) of the Finance Act 2005 as amended read together with the provisions of section 126 of the Finance Act 2001 are inconsistent with the Constitution, in particular Articles 6, 34, 37, 38.1, 40.4.1, 40.1, 40.3 and 40.6.1 thereof and/or with the ECHR, in particular Articles 6, 7, 8 and 10 thereof, whether interpreted in light of article 1, Part 1 of the European Social Charter or otherwise;
6. An order of prohibition restraining the first respondent from proceeding with the prosecution of the applicant for an offence contrary to section 78(3) of the Finance Act 2005 in respect of summons applied for on 20 September 2017;
7. An injunction, including if necessary an interim or interlocutory order, restraining the first respondent from taking any further steps in the prosecution of the applicant for an offence contrary to section 78(3) of the Finance Act 2005 in respect of summons applied for on 20 September 2017.

The statement of grounds is quite lengthy, and it may be helpful to divide the grounds into three broad categories. The first category contains grounds where the relief is sought on the ground of alleged vagueness and/or complexity of the offence-creating provisions. In this category, the arguments appear to be more focussed upon an objective matter, namely the alleged impenetrability of the offence-creating provisions for an ordinary citizen (and not

the appellant in particular). The argument appears to be primarily that a reasonable person would not know that the conduct in question constituted an offence. The following grounds appear to fall within this category:-

1. Section 78(3) of the Finance Act 2005 is unconstitutional in that it is inconsistent with Articles 38.1 , 40.4.1, 40.1, 40.3 and 40.6.1° of the Constitution because its *vagueness and its dense legal nature* together with the requirement to read or interpret it in conjunction with other equally dense and complex provisions of the same Act is such as to fail basic requirements for the creation of a criminal offence.

2. It *fails to give fair and adequate notice* of the type of conduct prohibited thereby breaching the fundamental value that a person subject to the criminal law should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful.

3. It purports to create a criminal offence that is void by reason of its *vagueness and/or its legal uncertainty and/or its dense legal nature*.

…

6. Despite its complexity and/or its legally dense nature, it does not contain a safeguard in the form of a requirement that individuals be *adequately informed* of the existence of this regulatory offence.

…

8 (iv). Unlike reg. 32 of the Irish Mineral Oil Tax Regulations 2012, in respect of the keeping of marked oil, there is no requirement on the Revenue Commissioners to publish notices informing the general public that it is an offence to sell tobacco products which, while bearing a tax stamp of another country does not bear an Irish tax stamp; (emphasis added)

…

8 (vu). There is no clear and accessible source to which citizens may go to determine the elements of regulatory offences in force;

…

9. Section 78(3) of the Finance Act 2005 is incompatible with articles 6, 7 and 10 of `the European Convention on Human Rights because its *vagueness* is such as to fail basic requirements for the creation of a criminal offence. As drafted it gives rise to *arbitrariness and legal uncertainty*. There is no safeguard in the form of a requirement that individuals be *adequately informed* of the existence of this regulatory offences. It also amounts to a disproportionate interference with the right to communicate and the right to freedom of expression.

8. The second category contains grounds which concern the ingredients of the offence and specifically the *mens rea* aspect (or absence thereof), including the following grounds:-

4. Despite its complexity and/or its legally dense nature, it fails to provide that the conduct, if any, prohibited must amount to an *intentional* violation of a known legal duty.

5. Despite its complexity and/or its legally dense nature, it fails to provide for a *good-faith misunderstanding of the law or a good faith belief* that one is not violating the law.

…

8 (v). Under Irish law, the principle that ignorance of the law is not an excuse applies even to complex regulatory offences;

8 (vi). This offence is one of strict if not absolute liability and *does not have a clear mens rea element* such as to soften the impact of the principle that ignorance of the law is not an excuse'; (emphasis added)

9. With regard to the second category of grounds, it is clear that the applicant/appellant's state of knowledge is relevant. Indeed, as noted earlier, he averred that what he had told the Gardai was true i.e. that he did not know that what he was doing was wrong. This bundle of arguments is premised upon the factual position that the appellant unintentionally violated the law or had a good faith understanding or belief that he was not violating the law. The question of his personal or subjective state of mind or knowledge is relevant here, unlike the first category of ground which concern an objective matter.

10. The third category of grounds relates to the sentencing options for the offence, and more particularly, the fact that the Probation Act cannot be applied to a person convicted of the offence even if the person genuinely did not know that what he was doing was wrong. These grounds include the following:

> 7. Despite its complexity and/or its legally dense nature, it fails to provide for a disposal/sentencing option, amounting to an absolute discharge, to be exercised in exceptional/extenuating circumstances, thereby disproportionately interfering with an accused's constitutional and/or ECHR right to a good name and/or to earn a living.
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> 8. It also amounts to a disproportionate interference with the right to communicate and the right to freedom of expression.
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> …
>
> 10. Section 126 of the Finance Act 2001 is inconsistent with Articles 6, 4, 37 and 40.3 of the Constitution and/or Articles 6 and 8 of the ECHR because it amounts to the absolute removal of a sentencing option and/or a disposal option from a hearing/sentencing court amounting to an undue encroachment by the legislature on the judicial function, in light of the separation of powers between the legislative, executive and judicial function.

11. There is no rational relationship between this absolute removal and the requirements of justice.

12. It unfairly and disproportionately discriminates between offending of a Regulatory nature and other "ordinary" offending.

13. It fails to acknowledge the different levels of offending behaviour and the different capacities and circumstances of offender that may commit the various offences covered by its provisions.

14. There is no safeguard by way of a possibility of an exception to be made in exceptional circumstances, such as when a person's livelihood is at stake. In particular:

i. Selling goods online is not inherently immoral - this offence depends on the categorisation of types of products;

ii. While the exclusion of the application of the Probation of Offenders Act 1907 is not a presumptive or mandatory minimum sentence, it does remove in a blanket fashion a sentencing option otherwise available to a sentencing court;

iii. It therefore disproportionately interferes with the applicant's constitutional right to work and/or to his good name;

iv. There is no provision for an exception to this by reason of exceptional and specific circumstances relating to the circumstances of offence and/ or the person convicted of it and in the interests of justice;

• There is no provision for an exception to this by reason of the minimum blameworthiness of *an individual who may genuinely not have been aware that they were committing an offence*;

vi. There is no provision for an exception to this by reason of the disproportionate effect of a conviction on a person's right to their livelihood, in circumstances where

there is a risk they would lose their employment on account of receiving a conviction and where they have no previous convictions, such as in the present case.

15. Section 78(3) of the Finance Act 2005 as amended is incompatible with articles 6 and/or 8 of the European Convention on Human Rights, interpreted in light of article 1, Part 1 of the European Social Charter.

11. The words italicised above indicate that the question of the applicant's state of knowledge is relevant to the third category of grounds (relating to sentencing) as well as the second category of grounds (relating to absence of *mens rea*), insofar as the claim is that what is unfair is that a person who is convicted *despite not knowing that what he did was an offence/illegal* might not be entitled to benefit from the application of the Probation Act. Thus, intrinsic to the alleged unfairness is (again) a claim about a factual matter, namely that the applicant/appellant did not know that he was did was an offence.

12. It might perhaps be said that there is also a fourth 'miscellaneous' category of grounds, based upon a mixture of existing and novel rights such as the right to earn a livelihood, a right to engage in micro-trading, and the right to freedom of expression, although they are probably not sufficiently independent of the above-identified three categories to warrant their being subsumed into an additional stand-alone category. However, it is worth noting the broad scope of the claims made and rights identified, a matter upon which the respondents lay some emphasis in arguing that the matter should be dealt with by plenary hearing.

The motion issued by the respondents

13. By letter dated the 29th June 2018, the Office of the Chief State Solicitor invited the appellant to discontinue the judicial review proceedings and to institute plenary proceedings instead. This proposal was declined by the applicant.

14. The respondents issued a motion on the 23 October, 2018, seeking two reliefs:

(1) An Order striking out the judicial review proceedings on the grounds that the substance of the Applicant's claim is more properly brought by way of plenary summons;

(2) In the alternative, an Order pursuant to Order 84, Rule 27(5) and/or Rule 27(7) of the Rules of the Superior Courts (as amended) that the proceedings continue as if they had begun by Plenary Summons.

15. Caitriona Keane, State Solicitor, swore an affidavit grounding the motion, in which she averred that:

- Actions such as this should be instituted, litigated and determined as plenary proceedings where the applicant should outline the precise factual basis upon which he contends that the statutory provisions are unconstitutional;
- Proceedings should not be mounted on a theoretical or contingent basis; it must be ensured that the applicant has the requisite locus standi to challenge the constitutionality of the legislation, and the constitutional issues should only be reached last and only when no other remedy is open to the applicant;
- The applicant had failed to outline any factual circumstances "beyond the fact that he has been charged with the said offences' to show that the provisions were unconstitutional;
- The factual scenario in his case involves the importation, with his knowledge of cigarettes from Turkey and the subsequent sale of those cigarettes by him and therefore issues about the applicant's knowledge of the law are germane to the proceedings and should be therefore litigated in plenary proceedings "whereby his legal contentions can be tested against the actual factual scenario in his case";

- No Act of the Oireachtas should be the subject of constitutional challenge other than on the basis of a clear challenge mounted "on a cogent factual basis", and where a person seeks to mount a challenge on a particular factual basis "it should be done in such a way that permits the Court to engage in as detailed an exploration of the underlying facts as the Court may consider appropriate"'; particularly "in circumstances where the issues raised are inherently subjective to the party bringing the challenge".
- Prospective litigants may not mount constitutional challenges by reference to "theoretical cases" or "a set of sanitised facts" or "otherwise seek to preclude a full factual exploration of the issues";
- By instituting proceedings by way of judicial review, the applicant has reserved to himself the issues of fact that will underpin the challenge because cross-examination is generally only available in judicial review where there is a clear dispute as to fact; this is "manifestly unsatisfactory given the obligation on a challenger to establish locus standi and a clear factual basis for the challenge"; in the present case much of the challenge "rests on wholly subjective assertions by the applicant" which were within the peculiar knowledge of the applicant but the form of proceeding chosen by him "essentially forestalls any exploration or challenge to such matters".

16. The applicant swore a replying affidavit in which he contested the view that his case was "theoretical", referred to his affidavit grounding the judicial review, and confirmed the following facts: that he had placed an advertisement on an online Facebook group called "Ballyfermot, buy, sell or swap goods" of the sale of 14 packets of Golden Virginia tobacco for €140; that he assumed there was no difficulty with doing this and did not realize that he was doing anything wrong; that he obtained a job with An Post on the 10 April 2017 and

that he was very concerned that his employment would be terminated if he received a conviction of this nature. He says that he exhibited the evidence that was to be led against him and that at all material times he had asserted that he was not aware that he was doing anything wrong in offering the tobacco for sale and that the disclosure in the District Court showed that the customs officer had made a note to that effect in her notebook on the day she stopped and questioned him.

17. Ms. Jean Tomkin, solicitor at Sheehan and Partners Solicitors, also swore an affidavit saying, among other things, that the courts have discretion to decide which procedure is more appropriate; that the Superior Courts had acknowledged the need to resolve constitutional issues as quickly where issues of that nature arise in District or Circuit Court proceedings; and that the principle that constitutional issues should be reached last is not engaged where the only way of interpreting the section is one imposing strict liability. She also asserted that her client had locus standi because he had a reasonable apprehension of a determination affecting his constitutional rights. She added: "It is not clear that there is any contest on the underlying facts of this case, and indeed, I say and believe that it is premature to determine whether any dispute as to the facts arises prior to receiving the statement of opposition." She also pointed out that there could be an application to cross-examine the applicant in the judicial review proceedings if there was any contest as to fact.

18. The motion was heard on the 21 May 2019, and was opposed by the appellant. It is common case that the primary basis for the respondents' application to the High Court judge was that they wished to cross-examine the appellant.

19. The High Court (O' Regan J.) delivered an *ex tempore* judgment at the conclusion of the hearing of the motion and directed that the matter proceed from that point onwards by way of plenary hearing under Ord. 84, r.7.

The High Court ex tempore judgment

20. A transcript of the Digital Audio Recording of the judgment was obtained by the respondents, from which the following points emerge. The judge started by saying that she was "terribly sympathetic to the need to cross-examine" once it had been asserted that cross-examination was necessary from the respondent's point of view. She said she was satisfied that this was not an inappropriate time to make the application and that it would only add to the costs and delay if she were to adjourn and re-hear the application after certain documents were in.

21. She said that the applicant had locus standi which was acknowledged by the respondent but added that " the reality is the factual background would dictate considerably beyond the *locus standi* as to whether or not the challenge will be successfully made" and "whether or not each of the component parts of the challenge are there insofar as the standing is concerned or the factual matrix is concerned".

22. She said that generally speaking the availability of legal aid might not be a relevant issue, but if it went to the availability of access to court, she was 'not inclined to the view that the applicant should therefore be deprived of his availability to challenge the matter". By this I assume she meant that she would assist the applicant as much as she could in terms of ensuring that he stayed within the Attorney General scheme, particularly as she followed that statement up by saying that if the applicant's legal team were 'more comfortable in proceeding further with his challenge if an order was made under Order 84, rule 27.7 rather than sub rule 5, and the DPP did not object, then that would be the appropriate way to achieve the best result. She then said that she would "direct a plenary hearing within the context of the judicial review proceedings"; that it would be necessary to file affidavits and a statement of opposition, and "the hearing will be on oral evidence".

23. There was then a discussion between DPP counsel and the court, and he submitted that rather than a statement of opposition it should be a defence, and that what the other side was looking for was "that the heading of the proceedings was judicial review" and that he was "not saying anything in respect of that". There was some further discussion between both counsel about the appropriate form of pleading documents and whether the amended statement of grounds should be treated as a statement of claim and whether particulars could be raised. The judge said she wanted the facilities which are normally available in plenary proceedings to be available. During the discussion, the judge commented that her intention was to enable the State to cross-examine and that "if that hadn't been raised as a matter of fact, I don't know that I would have had any objection to it proceeding as a judicial review…" There was further discussion as to whether the next document filed should be a statement of opposition or defence, and what was ultimately proposed by the trial judge was that it would be called both i.e. statement of opposition/defence. There was then a suggestion by the applicant's counsel that the State should put in affidavits, which was opposed by counsel for the DPP. Towards the end of the discussion, the judge indicated that "the reason we are maintaining it within the judicial review umbrella is simply to facilitate the applicant in respect of his costs" and that "the matter is proceeding henceforth as though a plenary hearing and therefore the time limits of four weeks…relate to the raising of particulars, the response to particulars and the statement of opposition/defence, but I am not directing at this stage that the affidavits would be filed". She said that a limited number of personnel from the Defendant's side would be giving evidence and the appellant would have the right to cross-examine them.

24. The Court ordered as follows:

"The Court directs a plenary hearing of the proceedings within the context of the within judicial review proceedings and makes the following ancillary directions:

- 4 weeks for the Respondents to raise a Notice for Particulars
- 4 weeks thereafter for the Applicant to reply
- 4 weeks after receipt of Replies for the Respondents to deliver its Statement of Opposition /Defence."

25. What emerges from the above rather unusual situation is the following: the judge changed the substance of the proceedings to plenary action but tried as far as possible to maintain the form of judicial review proceedings insofar as this might assist the appellant in terms of his legal aid/costs.

The appeal

26. The applicant appealed against that order under two separate headings. The first is set out in the following terms: "Whether the trial judge erred in directing a plenary hearing of the judicial review proceedings, in circumstances where the standing of the appellant to bring the proceedings is accepted, for the express purpose of permitting the applicant to be cross-examined in relation to the credibility of his potential defence which, if permitted, would usurp the function of the trial judge and/or sentencing judge on any remittal of the matter once a determination of the constitutional challenge has been made, contrary to the applicant's right to trial in due course of law under Article 38.1 of the Constitution".

27. The second issue is described as whether the trial judge erred in directing a plenary hearing of the judicial review proceedings under Ord. 84, r.27(7) prior to an exchange of the substantive pleadings between the parties to determine the factual and/or legal issues in dispute, in light of Ord. 84, rules 18(1), 22(1) and 27(1) and the applicant's right to fair procedures under Article 40.3 of the Constitution.

The Submissions of the parties

Submissions of the appellant

28. The appellant contends the courts have always accepted that a person charged with a crime has the necessary interest in bringing a constitutional challenge to legislation relevant to his or her trial, citing *Curtis v. Attorney General* [1985] I.R. 458; *C.C. v. Ireland* [2006] 4 I.R. 1; *Osmanovic v. DPP* [2006] 3 I.R. 504; *Dillon v. DPP* [2007] IEHC 480 and *M.D. v. Ireland* [2010] IEHC 101, [2010] 2 ILRM 491. The applicant has engaged with the facts sufficiently to give him standing to challenge the legislation and in circumstances where it was accepted by the respondents in the High Court that he has standing in the present proceedings, that should be the end of the matter. The appellant contends that he is entitled to a determination on the constitutionality of the legislative provisions without having to satisfy the court that he was not aware that selling fourteen packs of tobacco without an Irish revenue stamp was illegal. All he has to do was bring himself within a category of persons who might reasonably be entitled to raise the issue as a defence.

29. With regard to proof of factual matters, the appellant points to *CC v. Ireland* (a case brought by way of judicial review), saying that the challenge there was based entirely on the factual assertion in the applicant's grounding affidavit as to his state of mind, yet in that case the DPP did not seek to cross-examine *C.C.* on the credibility on matters raised by him as a potential defence to the criminal charge much less apply for the matter to be remitted to plenary hearing. He submits that he has gone even further than *C.C.*, including establishing that immediately upon being stopped by the customs officer he asserted that he did not know he was doing anything wrong and that this was recorded by the officer in her notebook.

30. The appellant also refers to *M.D. v. Ireland* (a case commenced by plenary summons) where the court was concerned about the "evidential vacuum" and was therefore provided

by the parties with an agreed set of statements from the book of evidence in order to give the court a sufficient factual background to the legal issues. The appellant contends that the evidence before the court, including the Garda notebook entry referred to above, is sufficient for the court to determine the legal issues and there is no 'evidential vacuum'. He says that he has therefore not presented the court with the type of situation criticised by Charleton J. in the *Sweeney v. Ireland* [2019] IESC 39, where there was a paucity of evidence before the High Court as to the proposed evidence in the criminal trial.

31. The appellant claims that the factual matrix in *PCO Manufacturing v. Irish Medicines Board* [2001] IESC 46, in which the judicial review proceedings were sent to plenary hearing and upon which the respondents rely, is in no way comparable to the present case. There, the company had a number of outstanding applications for product authorisations before the Medicines Board and claimed damages for the inactions of the Board which prevented them from selling medicinal products in the State. The Supreme Court held that it was beyond doubt that the case required oral evidence to be given and witnesses be subject to cross-examination. The appellant points out that this was not a case in which a declaration of unconstitutionality was sought nor was the company facing any criminal charges.

32. The appellant says, further, that the respondents conceded in the High Court that the underlying facts gave rise to no contest such as would trigger the possibility of applying to cross-examine the applicant on his affidavits.

33. The appellant says that the authorities relied upon by the respondents (*Riordan v. An Taoiseach (No.2)* [1999] 4 IR 343, *Nowaz v. Minister for Justice Equality and Law Reform* [2013] 1 I.R. 142, and *Sivsivadze v. Minister for Justice and Equality* [2016] 2 I.R. 403) to support the proposition that constitutional challenges should generally be brought by way of plenary proceedings were not cases where a person facing a criminal charge wished to challenge the constitutionality of the charge itself before the trial took place. The appellant

also notes that in *Nowaz,* Clarke J. noted that while the normal procedure for declaring the invalidity of an Act having regard to the Constitution was plenary proceedings rather than judicial review, "there is no rigid rule to that effect".

34. The appellant maintains, further, that it is relevant that the legal issues in the present case involve objective matters, such as whether s.78(3) of the Finance Act 2005 is impermissibly vague and whether s.126 of the Finance Act 2001 encroaches to an impermissible degree on the role of the judiciary.

35. Without prejudice to those submissions, the appellant seeks to rely upon certain parts of Order 84 of the Rules of the Superior Courts to support his challenge to the High Court ruling. He points to the provisions of Ord.84, r.27(7) and other provisions of Ord. 84 and argues that the purpose of those provisions is to ensure that a decision as to whether a plenary hearing is called for is made only when the position being adopted by each party to the proceedings has been made clear to the court. He complains that the respondents have not, even now, delivered a statement of opposition and submits that the judge's decision to convert the proceedings before that point had been reached was premature. The appellant relies upon *D.P. V. Governor of the Training Unit* [2001] 1 IR 492, in which Finnegan J. held that the court's discretion to order that judicial review proceedings continue as if they had been begun by plenary summons (pursuant to the provision then in force, Order 84, rule 26, being the predecessor of Order 84 rule 27(5)) only arose on the hearing of a motion or summons and not at the leave stage. The appellant submits that that it is only when the positions adopted by both parties are clear that the court is in a position to decide whether a plenary hearing is called for. In the present case, he submits, the decision was premature.

36. The appellant again refers to *PCO v. Irish Medicines Board* where the Supreme Court held that the High Court (Kelly J.) had been correct in referring the matter for plenary hearing although it had been commenced by way of judicial review. The appellant submits that the

stage at which the matter was referred to plenary hearing was a stage at which it was already clear what the position of both parties was, unlike the present case.

37. In oral argument, counsel on behalf of the appellant frankly indicated that one of the primary practical reasons for issuing a judicial review rather than plenary proceedings was due to the availability of financial assistance (the Attorney General's scheme) for such actions.

38. In oral argument, counsel also said that this was the first time the DPP had sought to have proceedings converted to plenary form specifically for the purpose of cross-examining a plaintiff and submitted that this was an entirely inappropriate reason for this course of action. She indicated that the appellant's opposition to what had been done was not so much the fact of plenary hearing but the reason given; namely, the desire to cross-examine the appellant. She contends that the objection to having the applicant cross-examined was on the basis that it would interfere with the appellant's trial rights including his right to silence.

Submissions on behalf of the respondents

39. The respondents say that the starting point is that a challenge to the constitutionality of legislation should be litigated in plenary proceedings and that the relevant case law has deprecated the institution of judicial review proceedings to litigate such issues. The respondents refer to *Riordan v. An Taoiseach (No.2)*, *SM v. Ireland* [2007] 3 I.R 283, *Damache v. DPP* [2012] 2 I.R 266 (see judgment of Denham CJ at para 11), *Nowaz v. Minister for Justice Equality and Law Reform*, and *Sivsivadze v. Minister for Justice and Equality* (see para 27 of the judgment of Murray J) for the proposition that a challenge to the constitutionality of legislation should ordinarily be brought by way of plenary proceeding.

40. They say that, insofar as the appellant seeks to distinguish himself from the above cases on the basis that they did not involve a person facing a criminal charge who sought to

challenge the constitutionality of the charge before the trial took place, the cases cited by the appellant all pre-date the unanimous decision of the Supreme Court in *Sivsivadze* and the recent decision of the Supreme Court in *Sweeney v. Ireland.*

41. The respondents maintain that the credibility or otherwise of the applicant is a central matter of fact to be determined in this case before the issues of constitutionality can be determined. They say that the reality of the case as pleaded is that the appellant is asserting that he was ignorant of the law and that the statutory provisions are difficult to understand. They say that there are factual and legal difficulties with such an assertion in circumstances where it is well known to any person in the State that tobacco products are sold in a regulated fashion within the state. They also refer to the challenge to the sentencing provisions for the charge itself (the Probation Act issue), and say that it is predicated on a particular and subjective state of affairs, namely the appellant's state of mind. They submit that the appellant ought not to be allowed to advance a "theoretical constitutional challenge" by way of judicial review, "based on a set of sanitised facts and devoid of a proper analysis as to whether such a contention is grounded in the facts of his own case". They contend that the appellant, by averring to factual matters on affidavit including the assertion that he did not know that what he was doing was wrong, had in effect put himself in the witness box and could not immunise himself from cross-examination. They say that the discussion in *Bita v. DPP & Ors.* [2020] IECA 69 shows that a litigant is not entitled to make "fanciful arguments" in support of a constitutional challenge. They say that a constitutional challenge to legislation is a serious and solemn exercise, involving a request that one organ of the State strike down the action of another organ of State, and that such an exercise should only be carried out in within an appropriate evidential foundation. The respondents refer to the comments of Charleton J. in *Sweeney v. Ireland* [2019] IESC 39 where he said there was a duty on those who bring constitutional challenges to "engage with the evidence". They say

that, insofar as those comments constituted an invitation to State respondents to object to what has been laid before the courts by an applicant, they are now taking up that invitation to object.

42. The respondents also say that the right to silence does not come into the case at all, as the appellant did not exercise his right to silence. On the contrary, he spoke to the Gardai (saying that he did not know that what he was doing was wrong) and the cross-examination would involve probing this assertion i.e. the cross-examination would be concerned with what he *did* say, not what he *did not say.* It was therefore impossible to see how his right to silence could be infringed by any such cross-examination.

43. The respondents also point to the broad sweep of the issues raised in the statement of grounds. For example, the appellant has pleaded that that a conviction would potentially impact upon his employment, and makes claims of interference with right to earn a livelihood and the right to engage in micro-trading. There would have to be appropriate evidence in relation to these aspects of the case also and not merely matters such as his state of mind at the time of his attempted sale of the products.

44. The respondents say that they are entitled to a plenary hearing 'in the normal way' and that it is not appropriate to apply a test requiring them to demonstrate that cross-examination is necessary and/or that it would make some difference to the outcome.

45. As regards the timing of the order made by the High Court, and its interaction with the Rules of the Superior Courts, the respondents point out that Ord.84, rule 27(7) says that "at any stage in proceedings …" the court on the application of any party or its own motion may direct a plenary hearing. They submit that the High Court was correct to find that it was an appropriate time for the respondents to make the application and the decision to direct a plenary hearing along with a time table for pleadings to be exchanged was correct. They say that the *D.P.* case is irrelevant, because it concerns the 'leave' stage of the process only. The

appellant is conflating rules relating to the leave application and rules relating to the hearing. In any event, they say, it would make no sense and would be highly impractical if a court were to reach the decision at a later stage that the proceedings had been wrongly constituted; the court should make this decision at the earliest possible time in order to save money and time.

46. At the oral hearing, the respondents accepted that it was the first time the DPP had sought to have proceedings converted to plenary form specifically in order to be able to cross-examine the plaintiff but maintained that in all the circumstances, this was an entirely legitimate approach.

47. The respondents refer to Order 84 rule 27(7) which uses the words “at any stage…”, and submits that it is appropriate that the court make the decision as to the appropriate form of proceeding as early as possible in the history of the case. Counsel also points out that the primary reliefs sought in the respondents’ motion was an order striking out the judicial review proceedings on the grounds that the substance of the applicant's claim is more properly brought by way of plenary summons, and that the second reliefs (converting the proceedings to plenary proceedings) was in a sense in ease of the appellant. He submits that if the appellant wishes to press the argument on the Rules of the Superior Courts, the Court may prefer to revert to the primary relief sought, which is to strike the proceedings out altogether.

Analysis and Decision

What general principles govern the form of procedure for bringing a challenge to the constitutionality of legislation?

48. As described above, a large number of cases were cited in argument to support each side’s position as to whether it was appropriate for the High Court judge to convert the

judicial review proceedings to a plenary action. The appellant pointed to a number of cases which concerned constitutional challenges to legislation which created or defined criminal offences and which had been pursued and dealt with by way of judicial review; including *C.C. v. Ireland* [2006] 4 IR 1, *Dillon v. DPP* [2008] 1 IR 383, *Damache v. DPP, Ireland and the Attorney General* [2012] 2 IR 266, *P v. Judges Circuit Court* [2019] IESC 26 and *Bita v DPP & Ors* [2020] IECA 69. However, it is not simply a question of identifying cases in which this procedure was previously adopted; rather it is necessary to engage with the statements of principle emerging from the authorities as to the relative desirability of each form of proceeding in particular situations. In some cases which were dealt with by way of judicial review, the court was critical that judicial review had been the procedure adopted. Accordingly, it is necessary to have regard to some points and principles which have been articulated by the courts over the years.

49. The following principles appear to me to emerge from the caselaw:-

1. The plenary action is the appropriate form of proceeding where the primary relief sought is the validity of legislation having regard to the Constitution: see *Riordan v. An Taoiseach* (No.2) (in particular pages 350-1 of the judgment of Barrington J; *S.M. v. Ireland* (paragraphs 29, 30 and 48 of the judgment of Kearns J.); *Damache v. DPP*, where Denham CJ at para 11 deprecated the use of the judicial review procedure; and *Nowaz v. Minister for Justice Equality and Law Reform* (Clarke J. at para 47).
2. The rules concerning the appropriate form of proceeding are not entirely rigid and all the circumstances of the case must be taken into account: *Nowaz v. Minister for Justice Equality and Law Reform* (Clarke J. at para 47)

3. A challenge to the constitutionality of legislation may be brought within a judicial review proceeding if, as Kearns J said in *S.M. v. Ireland*, "there is an underlying administrative or judicial decision which is being attacked. One can then "tack on" a challenge to the validity of particular legislation…" [1]
4. While judicial review is a remedy which in principle permits challenges to decisions made *in the course of* a criminal trial, this can be done only in the most exceptional circumstances (*Ward v. Special Criminal Court* [1999] 1 I.R. 60.)
5. While a judicial review may be brought *prior to* a criminal trial in order to obtain an interpretation or declaration in respect of the law concerning the offence charged, this should not be done as a matter of course, and the primary place for determining the ingredients of an offence is the court of trial, which has an overview of all the evidence: *CC v. Ireland*, judgment of Denham J at para 16, Fennelly J at paras 132-4, and Geoghegan J. at para 95; *P. v. Judges of the Circuit Court & Ors* (judgment of O'Donnell at para 24); and *Sweeney v. Ireland* (paragraphs 2-5 of the judgment of Charleton J.)
6. The High Court has a residual inherent power to determine how the proceedings may be disposed of, no matter by what method the proceedings were commenced: *PCO Manufacturing Limited v. Irish Medicines Board*.

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[1] The appellant suggested that this did not form part of the decision of Kearns J and that he was merely describing a submission of counsel. I disagree and in any event I consider it a correct statement of the law; see Barrington J at p.350 of Riordan v. An Taoiseach (No.2).

7. A litigant will not be permitted to issue plenary proceedings involving a constitutional challenge to legislation where this would have the effect of circumventing a particular statutory requirement, such as a time limit for judicial review, particularly if the statutory scheme clearly envisages constitutional challenges being brought by way of judicial review; *Nawaz* (in particular paras 44-54 of the judgment of Clarke J.).
8. The parties must ensure that the court which is to hear the constitutional challenge has sufficient evidence before it to enable it to properly address the substantive constitutional arguments in a reasonably concrete evidential context. The court should not be asked to decide matters of constitutional importance in an evidential vacuum: see, for example, *MD v. Ireland* (where the court required the parties to lay before it a summary of facts on the basis of which the action could proceed); *Sweeney v. Ireland*, (where Charleton J was critical of the absence of evidence before the court, see paragraphs 2-5).

50. I would observe also that the facts required for (8) above might not necessarily be identical to the facts required to establish *locus standi;* one can envisage that while fairly minimal facts might be required to establish *locus standi,* further facts might be needed for the court to decide the constitutional issues in a sufficiently concrete context and to avoid issues of *jus tertii.* In the present case, the *locus standi* of the plaintiff is not in dispute. The respondents, however, maintain that principle (8) above require that further facts be established before the court is asked to rule on a constitutional issue.

51. Applying the principles identified above to the present case, the following comments can be made. Having regard to (1) above, this was a type of case in which the obviously appropriate form of action was a plenary proceeding This was not a constitutional challenge

attached to a review of an administrative or judicial decision, such that it might fall within (5) above; no decision of the DPP or the District Court is under review at all. Having regard to (2) and (6) above, it is true that a High Court judge may have a residual discretion to decide upon the most appropriate procedure for a case, but the present case is not a marginal one; it is a straightforward action seeking reliefs condemning a piece of legislation and therefore falls squarely within the type of case which should be brought by way of plenary proceeding. Given that the presumptive form of proceeding is the plenary proceeding, the appellant therefore has something of an uphill battle to persuade the Court that the decision should be overturned. The appellant raises two specific arguments to suggest that the High Court Judge was not entitled to to do as she did.. The first of the arguments concerns the timing of the decision and its compatibility with Order 84 Rule 27 of the Rules of the Superior Courts; while the second is based on an argument concerning the interaction between these proceedings and the appellant's right to a fair (criminal) trial.

The argument under Order 84 and certain provisions of rule 27

52. As noted earlier, the appellant relies upon *D.P. V. Governor of the Training Unit*, in which Finnegan J. held that the court's discretion to order that judicial review proceedings continue as if they had been begun by plenary summons (pursuant to the provision then in force, Order 84, rule 26, being the predecessor of the provision currently contained in Order 84 rule 27(5)) arose only on the *hearing* of a motion or summons, and not at the l*eave* stage. The appellant submits that that it is only when the positions being adopted by both parties have been formally pleaded that the High Court is in a position to decide whether a plenary hearing is called for. In the present case, he submits, the respondents have failed to deliver a statement of opposition and the decision of the High Court was premature having regard to Order 84, Rule 27.

53. It seems to me that sub-rule 27(7) provides a full answer to this argument. It refers to the power of the court to direct the plenary hearing of a case "at any stage in the proceedings". It would certainly be preferable if the statement of opposition had been delivered before the respondent's motion issued, and it is difficult to understand why there has been such a delay in doing so. The judge was asked to reach her decision on the form of proceedings before the pleadings had clearly established the parameters of the case to be heard. However, while I do not think this is best practice, I would not go so far as to allow the appeal on this particular ground. The respondents' motion was grounded upon an affidavit (described above) which made plain that the respondents wish to contest the specific factual averment of the appellant that he did not know what he was doing was wrong/illegal/criminal, an averment which appears to be central to some of his constitutional arguments about the legislation. The precise basis upon which the judge made her decision to convert the form of the proceedings appears to have been to facilitate the cross-examination of the appellant on this issue. Therefore she was well aware of the relevant contours of the case by the time she made her decision. I do not think that it should be fatal to the respondents' motion, if it was meritorious in its substance, on the procedural ground that the statement of opposition had not been filed before the motion issued, as I am not persuaded that Order 84, Rule 27 makes it mandatory to file a statement of opposition before such a decision can be made by a High Court judge. Indeed, there is much to be said for the view that if there is to be a change of the form of the proceedings, it should take place sooner rather than later. I agree with Collins J. when he says at paragraph 16 of his judgment that the interpretation contended by the appellant would mean that the court would be powerless to intervene until the hearing if it had not been exercised at the leave stage and that this would be a most impractical interpretation of Order 84, rule 27(5). I also agree with the point he makes at paragraph 19 of his judgment when he says that the trial judge could have

granted the primary relief sought by the respondents (a strike out of the proceedings) and that it ill behoves the appellant now to complain that lesser relief was granted which was designed to be in ease of his position.

The argument that the cross-examination of the appellant in these proceedings would diminish or trammel upon his criminal trial rights

54. The appellant submits that the trial judge acted outside her appropriate zone of discretion in making the order she did, on the basis that if the appellant were to be cross-examined in the civil proceedings, this would diminish or trammel upon his criminal trial rights i.e. his future trial in the District Court (on the assumption that his constitutional challenge failed, and the criminal trial proceeded). The respondents, for their part, submit that the cross-examination of the appellant is necessary in order to establish a sufficient factual foundation in which the constitutional claim can then be considered. Further details of their respective submissions have been set out earlier.

55. For my part, I cannot see how the cross-examination of the appellant in the civil proceedings could trespass upon his rights during the criminal trial proper i.e. the stage of trial in which his guilt or innocence would be determined (if he were to plead not guilty) because the very nub of his complaint in the constitutional proceedings is that the wording of the legislation is such that the question of his state of knowledge and/or knowledge of the law is neither an element to be proved as part of the prosecution case nor a matter of defence. It is the very fact that his state of mind (specifically his ignorance of the law) is *irrelevant* to a determination of criminal liability which grounds his constitutional challenge to the offence. On his own logic, any determination made by a court in these civil proceedings on his state of mind (e.g. that they found his claim of ignorance of law credible or not credible) would simply be irrelevant at the criminal trial.

56. Reference was also made to his 'right to silence'. This is somewhat puzzling, as the appellant did not in fact exercise a right to silence when questioned, but rather chose to speak to the customs officer and used the opportunity to assert his ignorance of the law. Perhaps what is meant by this submission is his right to choose not to give evidence at his trial without adverse inference being drawn. But even if this is what is meant by the appellant, I cannot see how his being cross-examined in these civil proceedings might violate any such right, for the reason set out in the preceding paragraph.

57. In oral argument, this particular area of submission on behalf of the appellant appeared to focus more on the *sentencing stage* of the (potential) future criminal trial, rather than the earlier liability stage where guilt or innocence would be determined. In order to examine this argument further, let us imagine the scenario which would arise if the appellant at some point in the future has either been found guilty or has pleaded guilty and the District Judge embarks on the sentencing exercise. At its height the argument appears to run as follows: in the normal course, the appellant could invite the sentencing judge to have regard to the memo of the customs officer, according to which the appellant said he had no knowledge that what he was doing was wrong or illegal. The appellant could then invite the court to reach a conclusion that this was indeed what the appellant believed (or that there was a reasonable doubt that it might be so) without the appellant having to give evidence. This would provide mitigation for the appellant which might well reduce his sentence. However, this strategy would be undermined (the argument runs) if the High Court in the civil proceedings had previously heard him being cross-examined and had reached the conclusion/made a finding that it was not credible that he did not appreciate the wrongness or illegality of what he was doing. Thus, he would have effectively been 'forced' into the witness box in the civil proceedings on this issue whereas he could never be so forced in the criminal proceedings

even at sentencing stage. The practical effect would be that he would receive a more severe sentence because he would could no longer avail of this point in mitigation.

58. The respondents counter with the argument that the appellant chose to depose on affidavit in these proceedings that he had no knowledge that the conduct was illegal and thereby has already exposed himself not only to the possibility that the respondents might adduce contrary evidence but also to the possibility that he might be cross-examined. This is undoubtedly true. On the other hand, it seems to me that the appellant argues with some force that he has already laid a sufficient factual foundation for the determination of the legal issue, amounting to as much if not more than the factual foundation in some other cases of constitutional challenge to legislation (e.g. *C.C.,* or *M.D.),* and that it is neither necessary nor appropriate to subject him to cross-examination for the purpose of laying a sufficient factual foundation. To borrow a phrase from Denham J in *C.C.*, the "kernel issue" could be said to be clear.

59. All of this seems to me to be somewhat beside the point. The parameters of cross-examination have not yet been determined; rather, what has happened to date is that the High Court judge decided on the appropriate form of proceeding and took into account the issue of cross-examination in doing so. The action should have been brought by way of plenary proceeding in the first place. The trial judge was quite correct to convert the form of the proceeding to a plenary one. The question of cross-examination and its potential impact upon a future criminal trial can be dealt with by the High Court if and when that proves to be necessary. Any suggestion that the appellant's fair trial right might be imperilled by cross-examination can be dealt with appropriate application at the trial, taking into account the privilege against self-incrimination if it arises. The High Court can be trusted to ensure that the course of trial (including the taking of evidence and any findings made in due course by the court) will be appropriately focussed and limited to what is necessary. It is a regular

occurrence that the High Court deals with cases where there may at some future point be a criminal trial in which there is an overlap of some issues; it must be assumed that it will have due regard to the appropriate parameters of the case before it as well as any risk to the future criminal trial.

60. In all of the circumstances, I would therefore take the view that the Court should not interfere with the decision of the High Court that the case should continue as a plenary action. A plenary proceeding is the default position concerning constitutional challenges to legislation and this is not a case where the primary focus is a particular administrative or judicial decision accompanied by a constitutional challenge. On the contrary, the challenge to the legislation constitutes the entirety of the challenge and the trial judge was entirely correct to rule as she did.

61. For the above reasons, I would dismiss the appeal. My provisional view with regard to costs is that since the respondents have been entirely successful, they should be entitled to the costs of this appeal. If the appellant wishes to contend for an alternative form of order, it will have liberty to apply to the Court of Appeal office within 14 days for a brief supplemental hearing on the issue of costs. If such a hearing is requested and results in an order in the terms already proposed by the Court, the appellant may be liable for the additional cost of such hearing. In default of receipt of such an application, an order in the terms I have suggested will be made.

62. As this judgment is being delivered electronically, Edwards and Collins JJ. have indicated their agreement with this judgment and the concurring judgment of Collins J.