[2020] IEHC 209

THE HIGH COURT
JUDICIAL REVIEW

[2020 271 JR]

BETWEEN

GEMMA O'DOHERTY AND JOHN WATERS

APPLICANTS

AND

THE MINISTER FOR HEALTH, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

DÁIL ÉIREANN, SEANAD ÉIREANN AND AN CEANN COMHAIRLE

NOTICE PARTIES

JUDGMENT of Mr. Justice Meenan delivered on the 13th day of May, 2020

Introduction

1. The applicants, who appeared in person, seek the leave of the Court to bring judicial review proceedings challenging the constitutionality of legislation and regulations enacted to arrest the spread of a virus, Covid-19, within the State. The applicants are further challenging the steps taken and the procedures followed by the Oireachtas in enacting the legislation.

2. On 4 January 2020, the World Health Organisation ("*WHO*") reported on a cluster of pneumonia cases in Wuhan, Hubei Province of the People's Republic of China. Less than three weeks later, 22 January 2020, the WHO issued a statement stating that there was evidence of human to human transmission in Wuhan of such pneumonia disease, and that more investigation was needed to understand the full extent of transmission.

3. On 30 January 2020, the WHO reconvened its Emergency Committee. This Committee reached a consensus and advised that the outbreak constituted a Public Health Emergency of International Concern. On 11 February 2020, the WHO advised that this coronavirus disease would be officially named Covid-19. With international travel it was inevitable that Covid-19 would spread well beyond the borders of China.

4. The first country in Europe to experience a significant outbreak of Covid-19 was Italy. The effects on the health service, society and the economy were devastating. It was only a matter of time before Covid-19 spread to Ireland. This happened on 29 February 2020. The first death related to Covid-19 was reported on 11 March 2020, when there were 43 confirmed cases. At the time this application heard before the Court on 5/6 May, in Ireland there were some 22,248 confirmed cases of Covid-19 and 1,375 deaths. Covid-19 was declared a pandemic by the WHO on 11 March 2020.

5. The first named respondent took a number of measures to halt the spread of Covid-19 and to address the economic and social effects of the virus. Two pieces of legislation were enacted: -

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

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

In addition, a number of statutory instruments were made: S.I. No. 121/2020 –Health Act, 1947 (Section 31A¬ – Temporary Restrictions) (Covid-19) Regulations, 2020 and S.I. 128/2020 – Health Act, 1947 (Section 31a – Temporary Restrictions) (Covid-19) (Amendment) Regulations, 2020.

6. There was a further S.I.: S.I. No. 153/2020 – Health Act, 1947 (Section 31A – Temporary Restrictions) (Covid-19) (Amendment) (No. 2) Regulations, 2020, which extended the regulations to 18 May 2020.

7. Following the general election of February 8, 2020 the newly elected Dáil, on 20 February 2020, failed to elect a new Taoiseach. Under the provisions of Article 28.11.1°, the Taoiseach having resigned, the members of the Government were deemed also to have resigned; but the Taoiseach and other members of the Government continue to carry on their duties until their successors are appointed.

Application for judicial review

8. On 15 April 2020, the applicants made an application, ex parte, seeking the leave of the court to bring judicial review proceedings. This application was grounded upon a "*statement required to ground application for judicial review*" together with a short verifying affidavit. The original Statement of Grounds did not state with any clarity what reliefs the applicants were seeking, this was clarified in a further affidavit from the applicants sworn on 5 May 2020.

9. The applicants are seeking, *inter alia*, reliefs including: -

> "The relief sought is an order of certiorari of the above legislation and/or such further or other order to declare and render the legislation null and void on the grounds of its repugnancy to the various provisions of Bunreacht na hÉireann 1937."

The legislation is that referred to at para. 5 above.

10. Further, the applicants maintain that the said legislation: -

> "has not been validly enacted in accordance with the provisions of Bunreacht na hÉireann, Dáil Standing Orders of business 2020, the Interpretation Act, 1937 and the Statutory Instruments Act, 1947."

11. Given that the applicants have raised issues concerning the legislative process, the notice parties (whom I shall collectively refer to as "*the Oireachtas*") were joined to the proceedings.

12. The *ex parte* application for leave to bring judicial review proceedings was made before Sanfey J. who directed, pursuant to O.84, r. 24 RSC, that the application be made on notice to the respondents.

13. The matter was mentioned before Murphy J. on 21 April 2020 and before myself a week later for the purposes of setting out a timetable for the delivery of affidavits and legal submissions. On both occasions the applicants were invited to deliver legal submissions in support of their application. They chose not to do so. The matter was then fixed for hearing commencing 5 May 2020.

14. At the hearings, both before Murphy J. and myself, the applicants submitted that, by reason of limited access to the court for the public who wished to attend, the hearings were contrary to the provisions of Article 34.1 of the Constitution. Both Murphy J. and myself ruled on this matter in similar terms. I will refer to this ruling later in the judgment.

The legislation/regulations

15. I will set out in summary form the provisions of the legislation which the applicants seek to have declared unconstitutional, I will also refer to the regulations made thereunder: -

    (1) Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act, 2020.

    The long title of this Act states: -

    "An Act, to make exceptional provision, in the public interest and having regard to the manifest and grave risk to human life and public health posed by the spread of the disease known as Covid-19 and in order to mitigate, where practicable, the effect of the spread of the disease known as Covid-19, to amend the Health Act 1947 to confer a power on the Minister for Health to make regulations prohibiting or restricting the holding of certain events or access to certain premises and to provide for enforcement measures; to provide for powers for certain medical officers of health to order, in certain circumstances, the detention of persons who are suspected to be potential sources of infection …"

16. Section 10 of the Act amends the Health Act, 1947 (the Act of 1947) by the addition of a s. 31A which has the title "*Regulations for preventing, limiting, minimising or slowing the spread of Covid-19*".

    "31A.(1) The Minister [the first named respondent] may, having regard to the immediate, exceptional and manifest risk posed to human life and public health by the spread of Covid-19 … make regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19 ... to deal with public health risks arising … and, … such regulations may, in particular, provide for all or any of the following:

    (a) restrictions to be imposed upon travel to or from the State;
    (b) restrictions to be imposed upon travel to, from or within geographical locations to which an affected areas order applies;
    (c) without prejudice to the generality of paragraph (b), restrictions to be imposed upon persons or classes of persons resident in, working in or visiting locations referred to in paragraph (b) including (but not limited to)—

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

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

(d) the prohibition of events, or classes of events, …

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

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

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

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

(a) shall have regard to the following:

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

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

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(6) A person who—

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

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

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shall be guilty of an offence.

(7) A member of the Garda Síochána who suspects, with reasonable cause, that a person is contravening or has contravened a provision of a regulation made under

subsection (1) that is stated to be a penal provision, may, for the purposes of ensuring compliance with the regulation, direct the person to take such steps as the member considers necessary to comply with the provision.

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17. Section 11 of the Act amends the Act of 1947 by the addition of a s. 38A: -

"38A.(1) Where, having regard to the matters specified in subsection (2), a medical officer of health believes in good faith that—

(a) a person is a potential source of infection, and
(b) the person is a potential risk to public health, and
(c) his or her detention and isolation is appropriate in order to—

(i) prevent, limit, minimise or slow the spread of Covid-19, and
(ii) minimise the risk to human life and public health,

and
(d) such person cannot be effectively isolated, refuses to remain or appears unlikely to remain in his or her home or other accommodation arranged, or agreed, by the Health Service Executive,
the officer may in writing order the detention and isolation of such person in a hospital or other place specified in the order (including such other hospital or other place as may subsequently be appropriate and specified in the order) until such time as the medical officer certifies that the person's detention is no longer required for the purposes of this section.
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(4) A medical officer of health who makes an order under subsection (1) shall keep the detention order under review and ensure that a medical examination of the person who is the subject of the order is carried out as soon as possible and in any event no later than 14 days from the time the person has been detained.

(5) A person who is the subject of an order under subsection (1) may request that his or her detention be reviewed by a medical officer of health, other than the officer who makes the order concerned, on the grounds that he or she is not a potential source of infection.

…"

18. The first named respondent made regulations pursuant to s. 31A by way of S.I. No. 121/2020. These regulations concern, inter alia, the restriction of movement of "*applicable persons*", "*applicable person*" means a person whose place of residence is located within an area in which an "*affected areas order*" applies.

19. Regulation 4 provides: -

"(1) An applicable person shall not leave his or her place of residence without reasonable excuse.

(2) such reasonable excuse … includes an applicable person leaving his or her place of residence … to -

(a) provide, or assist in the provision of, an essential service, whether for remuneration or not,

(b) go to an essential retail outlet for the purpose of obtaining items (including food, beverages, fuel, medicinal products, medical devices or appliances,

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(e) attend a medical appointment or accompany, to a medical appointment, any other person residing in the relevant residence or a vulnerable person,

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(g) donate blood or accompany any other person residing in the relevant residence to donate blood,

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(i) exercise, either alone or with other persons residing in the relevant residence,

(j) attend to vital family matters (including to provide care to vulnerable persons),

(k) attend the funeral of –

(l) fulfil a legal obligation (including attending court, satisfying bail conditions, or participating in ongoing legal proceedings),

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20. By way of S.I. 128/2020 the first named respondent provided that the above regulation would remain in operation until 5 May 2020. It was subsequently renewed.

21. (2) Emergency Measures in the Public Interest (Covid-19) Act, 2020.

This Act made amendments to several pieces of legislation for the purposes of mitigating "*the adverse economic consequences resulting, or likely to result from the spread of [Covid-19]... and to mitigate its impact on the administration of vital public service functions….*" (Long title)

22. The applicants referred to part 2 and part 5 of this Act as being contrary to the Constitution.

23. Part 2 concerns the operation of the Residential Tenancies Act, 2004. It provides that for a period of three months commencing the day of the commencement of the Act a landlord shall not serve a notice of termination in relation to the tenancy of a dwelling. There is a prohibition on rent increases and: -

"(7)(a) … all proposed evictions in all tenancies in the State, including those not covered by the Act of 2004, are prohibited during the operation of the *Emergency Measures in the Public Interest* (Covid-19) Act 2020…."

24. Part 5 of this Act makes certain amendments to the Mental Health Act, 2001. These provisions provide for changes to the Mental Health Tribunal providing where a Mental Health Tribunal cannot be appointed in the usual way "*due to the exigencies of the public health emergency*" a Tribunal consisting of one member shall be a practising Barrister or Solicitor has not less than seven years' experience may be appointed. Provision is also made for the carrying out of medical reports under s. 17 of the Act of 2001.

Principles to be applied

25. The principles which a court should apply to an application such as this are well established. I refer to the following passage from the judgment of Finlay C.J. in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374. At p. 377 of the judgment Finlay C.J. stated: -

"It is, I am satisfied, desirable before considering the specific issues in this case to set out in short form what appears to be the necessary ingredients which an applicant must satisfy in order to obtain liberty of the court to issue judicial review proceedings. An applicant must satisfy the court in a *prima facie* manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:–

(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).
(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.
(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks…"

26. It is to be noted that Finlay C.J. referred to these "*ingredients*" as being "*set out in short form*".

27. There was further elaboration in the Supreme Court judgement of *Esme v. Minister for Justice and Law Reform* [2015] IESC 26, where Charleton J. stated: -

"Any issue in law can be argued: but that is not the test. A point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success. It is required for an applicant for leave to commence judicial review proceedings to demonstrate that an argument can be made which indicates that the argument is not empty. There would be no filtering process were mere arguability to be the test without, at the same time, taking into account that trivial or unstatable cases are to be excluded: the standard of the legal point must be such that, in the absence of argument to the contrary, the thrust of the argument indicates that reasonable

prospects of success have been demonstrated. It is still required to be shown that a *prima facie* legal argument has been established. … In terms of law, the test is no different: it is a point of law which if not balanced or outweighed by other principles will suffice to establish the contention. This is the filter, which the leave application is designed to be, in order to ensure that there is sufficient reason to disrupt administrative decisions and to litigate them."

28. Finally, I refer to the decision of Birmingham J. (as he then was) in *Agrama v. Minister for Justice and Equality* [2016] IECA 72 where he stated that a point cannot be arguable if it is contrary to existing case law or if it is "*based on a fundamental misconception*".

29. The principles that emerge from these authorities are very clear. The burden is on the applicant to depose to such facts in his/her grounding affidavit which, if proven, could make an arguable case in law that has a prospect of success. A case that is contrary to case law or contrary to the clear wording of an Article(s) in the Constitution would not be such a case. If there were not such a requirement then an application for leave would be a pointless procedure. The application for leave has a low threshold but it is, nonetheless, a threshold.

30. In addition, there is also a requirement that the applicant satisfy the court that he/she "*has a sufficient interest in the matter to which the application relates*". I refer to the following passages of Henchy J. in Cahill v. Sutton [1980] I.R. 269, where at p. 282 he states: -

"On the contrary, in other jurisdictions the widely accepted practice of courts which are invested with comparable powers of reviewing legislation in the light of constitutional provisions is to require the person who challenges a particular legislative provision to show either that he has been personally affected injuriously by it, or that he is in imminent danger of becoming victim to it. This general rule means that the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right. In that way each challenge is assessed judicially in the light of the application of the impugned provision to the challenger's own circumstances."

and, at p. 283: -

"While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional, there are countervailing considerations which make such an approach generally undesirable and not in the public interest. To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person

whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented."

31. This issue was more recently considered by the Supreme Court in *Mohan v. Ireland* [2019] IESC 18. O'Donnell J. stated: -

"12. The step of permitting a challenge to the constitutional validity of a piece of legislation should not, therefore, be taken lightly, simply because someone wishes, however genuinely, to have the question determined, but rather should only be taken when a person can show that they are adversely affected in reality. Courts do not exist to operate as a committee of wise citizens providing a generalised review of the validity of legislation as it is enacted, nor should courts become a forum for those who have simply lost the political argument in the legislature to seek a replay of the argument in the courts, repackaged in constitutional terms. On the contrary, the question of the validity of legislation is treated by Article 34.3.2° as part of the jurisdiction of the Superior Courts only, established under Article 34.1, whose function it is to administer justice between the parties. This normally requires a real case or controversy which the parties require (rather than simply desire) to be resolved in order to establish and justify the court's exercise of jurisdiction, and the possibility of the invalidation of legislation. Accordingly, it is necessary to show adverse effect, or imminent adverse effect upon the interests of a real plaintiff. …"

and: -

"16. It is, I think, noteworthy that Henchy J. speaks in terms of a person's 'interests' being affected, rather than his or her rights. This, in my view, is logical, even if there is little harm in conflating the two questions in most cases. Strictly speaking, however, the first question is whether a person's interests are affected by the provision in question. 'Interest' is a deliberately broad term, extending beyond constitutional or even legal rights. It is sufficient if a person is, therefore, affected in a real way in in his or her life…"

32. As mentioned earlier, the burden of proving that the legislation in question is repugnant to the Constitution lies on the applicants. This is a heavy burden. As was stated by Keane C.J. in *The Article 26 and the Planning and Development Bill, 1999* [2000] 2 I.R. 321, referring to Ryan v. Attorney General [1965] I.R. 294: -

"the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to legislation dealing with controversial social and economic matters. It is peculiarly the province of the Oireachtas to seek to reconcile in this area the conflicting rights of different sections of society and that clearly places a heavy onus on those who assert that the manner in which they have sought to reconcile those conflicting rights is in breach of the guarantee of equality."

33. In this application an order has been made that the application be made on notice to the respondents (and now the notice parties). This raises the issue as to whether the applicants now face a higher threshold. I am of the view that they do not (see Denham J. in *D.C. v. DPP* [2005] 4 I.R. 281). However, the applicants do have to deal with the submissions made by the respondents and the notice parties which they otherwise would not have had to do were this application made *ex parte*.

The application

34. The applicants' case against the respondents concerns the constitutionality of the legislation and regulations referred to. The case against the notice party, the Oireachtas, concerns the legislative process. I propose to deal with these matters separately.

The claim of unconstitutionality

The submission of the applicants

35. The applicants submitted a lengthy statement, of some 34 pages, to ground their application. The first number of pages are under the heading: "*background facts*". The narrative concerning the extent and consequences of Covid-19 in this State ends on 16 March 2020. An affidavit verifying the grounds, sworn on 5 May 2020, deposed to no new additional facts since 16 March 2020.

36. The Statement of Grounds sets out various pieces of legislation which they seek to challenge. In respect of ss. 31A and 38A of the Act of 1947 (as amended) they state: -

> "… are not only repugnant *ab initio* to the provisions of the Constitution …but furthermore are wholly disproportionate to the incidence and effects of Covid-19 with respect of the Regulations constricting the movement of persons I say that such were made '..with no legal or clinical justification or cause, and with no evidence being presented to the public that such measures have ever succeeded in any comparable situation in achieving the stated purpose of the government, and with no state of emergency being formally declared by the Houses of the Oireachtas either and notwithstanding the fact that no state of emergency in actuality exists is grossly disproportionate to the aims (irrespective of their validity) of the Minister…"

This formula of words is used in several places throughout the Statement of Grounds.

37. On the amendments to the Mental Health Act, 2001, the applicants state: -

> ".. these draconian, regressive and unnecessary measures have no role or function in addressing or mitigating the situation vis-a-vis Covid-19, which the government has claimed as the basis for the contents of this legislation, and place at grave risk the liberty, safety and wellbeing of vulnerable people and others and in doing so set backwards many of the gains that have been made in recent decades in safeguarding the rights of psychiatric patients for no ostensible purpose related to the present claimed circumstances."

38. As for the amendments to the Residential Tenancies Act, 2004, the applicants state: -

"Section 7 of the Emergency Measures Act, 2020 is repugnant to the provisions of Article 40.3 as same provides for a suspension of proceedings before the Tenancy Tribunal in which landlord and tenant disputes are adjudicated thereby directly interfering with the rights of landlords and tenants to resolve disputes relating to occupancy and rental payments among other matters set down by the Residential Tenancy Act, 2004 and constitutes a direct impediment to the access of justice in respect thereto despite no state of emergency being ratified by that House of the Oireachtas .."

39. In their submissions to the Court, the applicants submitted that the only "*emergency*" provided for in the Constitution is that referred to in Article 28.3.3° and that the Covid-19 pandemic is not such an emergency. The applicants questioned the accuracy of the figures relating to the amount of persons infected by Covid-19 and the number of deaths. They also referred to the first named respondent as acting on "*fraudulent science*". In addition, there were references to a statement made by a former judge of the U.K. Supreme Court (who was not commenting on the legislation in question), the arrival of a "*police state*" and a parallel made with Nazi Germany.

40. The applicants identified a number of Articles in the Constitution which they claim the legislation (and regulations) are in breach of: -

"Article 40

3.1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. [Reference was made also to unenumerated rights]

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

…

4.1° No citizen shall be deprived of his personal liberty save in accordance with law.

…

5. The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.

6 .1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –

i …

ii. The right of the citizens to assemble peaceably and without arms.

Article 41

1.1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

Article 44.2

1° Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

Article 45

2. The State shall, in particular, direct its policy towards securing:–

i. That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs."

41. The applicants submitted that the regulations made by the first named respondent were unconstitutional as the first named respondent had no power to legislate, as per Article 15.2.1°.

42. The applicants further submitted that provisions in the legislation were contrary to various Articles of the European Convention on Human Rights and the EU Charter of Fundamental Rights.

Submissions of the respondents

43. Mr. Patrick McCann SC, on behalf of the respondents, submitted that the applicants adopted an incorrect procedure in bringing these proceedings to have the legislation declared unconstitutional. The correct procedure was to bring the application by way of plenary proceedings, not judicial review proceedings. In support of this, he referred the Court to the decision of Kearns J. (as he then was) in *S.M. v. Ireland* [2007] 2 ILRM 110 at 119: -

"Although the [Supreme] Court in [*Riordan*] did in fact consider the constitutional issues raised in the case notwithstanding that the plaintiff had proceeded otherwise than by way of plenary summons, it is by now well established that a statutory provision should only be challenged on grounds of unconstitutionality in judicial review proceedings if 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."

However, counsel did accept that there is a provision in the Rules of the Superior Courts to order that the proceedings continue as if they had been begun by plenary summons (O. 84, r. 27(5)).

44. On the merits of the application, Mr. McCann submitted that the applicants satisfied none of the tests required for a court to grant leave. Referring to Cahill v. Sutton *and Mohan v. Ireland*, Mr. McCann submitted that the applicants had not established sufficient interest or standing to challenge the legislation or regulations. This was all the more so in the case of their challenge to the amendments of the Residential Tenancies Act, 2004 and the Mental Health Act, 2001.

45. Though not conceding on the issue of interest or standing in respect of the restrictions on movement, detention of persons and closure of premises, Mr. McCann pointed to the complete absence of any facts deposed to by the applicants whereby it could be argued that the measures taken to combat Covid-19 were disproportionate. The respondents relied on a lengthy and detailed affidavit of Ms. Bernie Ryan, Principal Officer in the Department of Health, which set out the factual background to the enactment of the legislation.

46. 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.

47. On the applicants' case being made, that the regulations under the legislation are contrary to the provisions of Article 15.2.1°, Mr. McCann submitted that the courts have repeatedly confirmed that the making of regulations under statute is constitutionally permissible. He pointed out that the applicants have made no case that the regulations in question are more than giving effect to the principles and policies which are contained in the statute (*City View Press Limited v. An Comhairle Oiliúna* [1980] I.R. 381).

48. The respondents further submitted that the European Convention on Human Rights and the Charter of Fundamental Rights and/or other EU law does not have application.

Consideration of issues

49. On the issue concerning the procedure followed by the applicants in challenging the constitutionality of the legislation, I accept the submissions of the respondent. However, were I to reach the conclusion that the applicants had established an arguable case, I believe that the correct course for me to take would be to order that the proceedings continue as if they had been begun by plenary summons.

50. Sections 31A and 38A of the now amended Act of 1947 set out the statutory basis for the restrictions on the free movement of people, the detention of people in certain circumstances, the closure of premises and the prohibition of certain events. The stated purpose of these restrictions is to halt the spread of Covid-19 and, thus, are designed to affect every person residing in the State. This clearly includes the applicants. Thus, I am satisfied that the applicants have standing to challenge the constitutionality of these sections.

51. The next matter that I then have to consider is whether the applicants have established an arguable case. Previously in this judgment, I have set out the applicable legal principles and also various Articles of the Constitution which the applicants maintain ss. 31A and 38A are in breach of.

52. Article 41 concerns "*the family*". In my view, no case has been made out that s. 31A, s. 38A or any other amendment to the Act of 1947 is inconsistent with Article 41. The

applicants maintain that restrictions on movement and assembly are destructive of family life. There is no doubt but that these restrictions do interfere with normal family life, but this is not a breach of Article 41. The rights as to free movement of persons and assembly are to be considered in the context of the relevant Articles that provide for such. I am also satisfied that the applicants are not entitled to rely upon Article 45, which sets out principles of social policy. These principles are not "*cognisable by any court under any of the provisions of this Constitution*", as stated in the Article. Nor was any case made that any unenumerated constitutional right was breached.

53. Previously in this judgment, I have set out the Articles of the Constitution that provide for the personal rights of the citizen, that the dwelling of every citizen is inviolable, the right to assemble peaceably, and the practice of religion. It is clear from the wording of these various Articles that such rights are not absolute and may be restricted. The applicants accept this but maintain that the restrictions and limitation of rights provided for in ss. 31A and 38A are "*disproportionate*".

54. To begin to make an arguable case that these restrictions and limitations of rights are disproportionate, it was necessary for the applicants to put on affidavit some facts which, if proven, could support such a view. There was a complete failure by the applicants to do so. The narrative in their "st*atement required to ground application for judicial review*" ended on 16 March 2020 when some 268 cases of Covid-19 and the deaths of two persons were reported. The application for leave was made *ex parte* four weeks later, on 15 April 2020, without the narrative being updated. The applicants' grounding affidavit was sworn on 5 May with still no update in the narrative. This was, now, some seven weeks after the date on which the applicants had ended their narrative. It is worth noting that on 5/6 May, the Department of Health stated that there were some 22,248 cases of persons having Covid-19 and 1,375 deaths. The applicants made no reference to this.

55. In their Statement of Grounds and submissions to this Court, the applicants questioned the accuracy of the figures given for the numbers of persons infected with Covid-19 and the number of deaths reported. They went a good deal further and maintained that the science involved was "*fraudulent*". Other than their views, the applicants identified no supportive expert opinion either in the Statement of Grounds or grounding affidavit. As opposed to this, the respondents filed an affidavit of Ms. Bernie Ryan, Principal Officer in the Department of Health, which set out, in detail, the background and reasons for the legislation in question. The applicants did not seek to reply to this affidavit.

56. Unfortunately, in making their case for leave the applicants, who have no medical or scientific qualifications or expertise, relied upon their own unsubstantiated views, gave speeches, engaged in empty rhetoric and sought to draw an historic parallel with Nazi Germany – a parallel which is both absurd and offensive. Unsubstantiated opinions, speeches, empty rhetoric and a bogus historical parallel are not a substitute for facts.

57. In my view, the applicants do not have standing to challenge the amendments to the Mental Health Act, 2001. This Act, in its terms, is clearly directed towards persons who are in a defined category. The applicants made no case that they were within such

category. In deciding this, I am applying the principles, already set out, in *Cahill v. Sutton* and *Mohan v. Ireland*. A similar situation arises in the case of the applicants' challenge to the amendments of the Residential Tenancy Act, 2004. The applicants have not sought to make any case that they are affected by these far reaching amendments. They did not claim to be landowners, landlords, or tenants.

58. The applicants made the case that the first named respondent, in making regulations under the statute in question, was acting unconstitutionally. Delegated legislation is permissible under the Constitution and no case was made by the applicants that the regulations were outside the principles and policies contained in the enabling statute. Rather, the attack on the regulations was based on the view of the applicants that the restrictions in question were disproportionate, a matter I have already dealt with.

59. I accept the submission of the respondents that the European Convention on Human Rights (European Convention on Human Rights Act, 2003) is not directly effective and that measures cannot be invalidated on the basis that they are repugnant to it. I also accept, as submitted by the respondents, that the Charter of Fundamental Rights and/or other EU law does not apply to domestic law.

60. By reason of the foregoing, I am satisfied that the applicants, where they have standing, have not made any arguable case in support of their claim that the legislation and regulations in question are unconstitutional.

The Oireachtas

61. The applicants maintain that the passage of the legislation through the Dáil and Seanad was unconstitutional. In support of this, they question the legal standing of the Government given that three Ministers are no longer members of Dáil Éireann. They also question statements made by the Ceann Comhairle limiting the number of deputies present in the Dáil given the requirements for social distancing.

62. In their Statement of Grounds, the applicants refer to a "*caretaker Dáil*" and an "*outgoing incarnation of Seanad Éireann*".

63. In support of their submission that these matters are justiciable, the applicants referred to the UK Supreme Court decision in *R (Miller) v. The Prime Minister* and *Cherry v. Advocate General for Scotland* [2019] UKSC 41. Further, the applicants were critical as to what they considered to be the absence of any real debate on the legislation as it passed through the Dáil and Seanad. The applicants also referred to a "*note*" from the Oireachtas Library & Research Service which they claim is supportive of their case.

Submissions of the Oireachtas

64. Mr. Francis Kieran BL, on behalf of the Oireachtas, submitted that the issues raised by the respondents were not justiciable. This flows from the constitutional principle of the separation of powers. He referred the Court to the provisions of Article 15.10, which reads: -

"10. Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties."

65. Mr. Kieran cited a number of authorities in support of his submission. He referred to the following passage from the judgment of Ó Dáiligh J. (as he then was) in *Wireless Dealers Association v. Minister for Industry and Commerce* (Unreported, Supreme Court, 14th March, 1956):-

"This survey of the Constitution is adequate to demonstrate that the Constitution makes each of the two Houses of the Oireachtas complete master of its own deliberations and that the High Court, while granted the general jurisdiction to pronounce on the constitutional validity of laws, i.e. measures which have been passed by both Houses and duly signed and promulgated by the President, exercise no functions with regard to the deliberations of the Oireachtas."

66. This passage has been cited more recently *in Maguire v. Ardagh* [2002] 1 I.R. 385 and *Callely v. Moylan* [2014] 4 I.R. 112.

67. The number of deputies present when this legislation was being debated and passed by the Dáil cannot be considered by this Court. Mr. Kieran referred to Article 15.11.1° and 15.11.3° of the Constitution, which provide: -

"1° All questions in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present and voting other than the Chairman or presiding member.

…

3° The number of members necessary to constitute a meeting of either House for the exercise of its powers shall be determined by its standing orders."

68. It also follows from this that the criticisms which the applicants make of the Ceann Comhairle are non-justiciable as they concern the internal procedures of the Dáil.

69. Mr. Kieran submitted that what is often described as a "*caretaker government*", though the term is not used in the Constitution, is clearly provided for in Article 28.11.1°, which reads:-

"11.1° If the Taoiseach at any time resigns from office the other members of the Government shall be deemed also to have resigned from office, but the Taoiseach and the other members of the Government shall continue to carry on their duties until their successors shall have been appointed."

Also, the terms used by the applicants such as "*caretaker Dáil*" and "*outgoing Seanad*" have no meaning in law. It was submitted that the Dáil and Seanad which passed the legislation were validly constituted under the Constitution.

Consideration of issue

70. In my view, the submissions made by Mr. Kieran are correct. 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.

71. 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…".* The fact that a number of the members of the Government who were in office at the date of the dissolution of the Dáil are no longer members of the Dáil does not affect this. 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.

72. No case has been made that the Dáil and Seanad that considered and passed this legislation were not validly constituted.

73. The applicants' reliance on the UK Supreme Court decision in *R (Miller) v. The Prime Minister* and *Cherry v. Advocate General for Scotland* is misplaced given the totally different constitutional position in this jurisdiction and the different factual background. The "*note*" from the Oireachtas Library and Research Service does not, as stated therein, have any legal standing, and anyway, is couched in general terms.

74. If the applicants are dissatisfied as to the quality of the contributions in the Dáil and Seanad made during the passage of this legislation, then this is a matter that should be taken up with the Deputies and Senators concerned. The court has no role in this.

75. In conclusion, I am satisfied that the applicants have established no arguable case against the Oireachtas. Indeed, I would go so far as to say that the case which they seek to make is unstateable.

Hearing in Public

76. Article 34.1 of the Constitution provides:-

> "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."

Amongst measures introduced to prevent the spread of Covid-19 was "*social distancing*". In a court setting, social distancing means that it is no longer possible to have as many members of the public physically present in court as used to be the case. It was always

the case that for the hearing of certain actions, not every member of the public who wished to attend in court could do so. There is an obvious physical restraint, being the size of the courtroom. With social distancing, the facilitating of members of the public who wish to attend in court has been reduced. However, it does not follow that because every member of the public who wishes to attend cannot do so, that the hearing is not being held in public. In this case, members of the media who wished to attend to report on the proceedings were facilitated. Most members of the general public acquire their knowledge of court cases through the media. In addition, Murphy J. directed that the applicants be furnished with a copy of the transcript of the hearings without the usual charge. I continued this order for the hearings before me. I am satisfied, notwithstanding the physical limitations imposed by social distancing on the numbers of the public who could attend in court, that these hearings were heard in accordance with Article 34.1 of the Constitution.

Summary

77.(1) The applicants have sought to challenge the constitutionality of certain legislation enacted to combat the Covid-19 virus. They also challenge the legal standing of the Government and the procedures followed in the Oireachtas in the passing of this legislation. Such an application should have been brought by way of plenary proceedings, not judicial review. However, as under the Rules of the Superior Courts, the court may order the proceedings to continue as if they had been begun by plenary summons, I will not take any point on this;

(2) The principles to be applied by a court on an application seeking leave to bring judicial review proceedings are clear. The applicants must have standing and depose in their grounding affidavits facts that would be sufficient, if proved, to support arguable grounds for the reliefs sought;

(3) I am satisfied that the applicants have standing to challenge the provision of ss. 31A and 38A of the Health Act, 1947 (as amended) and the regulations made thereunder. I find that the applicants have no standing to challenge to the amendments of the Residential Tenancies, 2004 and Mental Health Act, 2001;

(4) The legislation enacted to address the health and economic issues that arise from the Covid-19 pandemic undoubtedly restrict people's constitutional rights. However, the constitutional rights involved are not absolute, so for an arguable case to be made, the applicants must depose such facts on affidavit which, if proven, would establish that such restrictions are disproportionate. No such facts were deposed;

(5) In their "*statement required to ground application for judicial review*" filed in court on 15April 2020, the applicants set out a narrative of events concerning the effects of Covid-19 which ended on 16 March 2020. In their subsequent verifying affidavit, sworn 5 May 2020, the applicants did not bring this narrative up to date. On 16 March 2020, it was recorded that there were 268 confirmed cases of persons infected with Covid-19 and the deaths of two persons infected with the virus. The relevant figures for 5/6 May 2020 were 22,248 persons infected and 1,375 deaths;

(6) The applicants, who have no medical or scientific qualifications, in their Statement of Grounds and submissions to the Court maintained that the figures in relation to the number of persons infected with Covid-19 and number of deaths were overstated. Further, the applicants submitted that the first named respondent was following "*fraudulent*" science. No factual basis nor any supportive expert opinion was deposed to, to support this. Rather, in court, the applicants gave unsubstantiated opinions, speeches, engaged in empty rhetoric and sought to draw an historical parallel with Nazi Germany. Such a parallel is both absurd and offensive. Unsubstantiated opinions, speeches, rhetoric and a bogus historical parallel are not substitutes for facts;

(7) Contrary to the assertions of the applicants, the making of regulations by the first named respondent pursuant to the legislation is constitutionally permissible;

(8) The applicants are not entitled to rely upon, as they seek to do, the European Convention on Human Rights (European Convention on Human Rights Act, 2003) and/or the Charter of Fundamental Rights and/or other EU law;

(9) Given the clear terms of the relevant Articles in the Constitution and the legal authorities that have considered same, the applicants have made no arguable case against the notice parties (the Oireachtas). The case which they sought to make against these parties is unstateable; and

(10) I am refusing the applicants' application seeking leave to bring these judicial review proceedings and will dismiss the application.

78. As this judgment is being delivered electronically, I invite the parties to make written submissions as to the consequential orders, in particular, the matter of costs.