APPROVED [2020] IEHC 382

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 200 J.R.

BETWEEN

EMMETT CORCORAN
ONCOR VENTURES LIMITED T/A "THE DEMOCRAT"

APPLICANTS

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA
DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 September 2020

INTRODUCTION

1. These proceedings raise important issues of principle in relation to freedom of expression, and, in particular, the protection of journalistic sources. More specifically, the proceedings require consideration of the difficult question of how the public interest in the proper investigation and prosecution of criminal offences is to be balanced against the public interest in a free press.

2. The first named applicant for judicial review ("***Mr Corcoran***") describes himself as a journalist and the editor of a local, monthly newspaper. Mr Corcoran asserts that, in his capacity as a journalist, he had attended at the scene of a serious criminal incident. It appears that Mr Corcoran had been brought to the location by an unidentified third party. Mr Corcoran made a video recording of the scene on his mobile telephone and took a number of digital photographs. Mr Corcoran has since made a copy of the video

recording and digital photographs available to An Garda Síochána, but had refused to hand over his mobile telephone on the basis that to do so could disclose his sources. Mr Corcoran expressly asserted journalistic privilege at a cautioned interview with An Garda Síochána. Several months later, An Garda Síochána obtained a search warrant from the District Court which purported to authorise the search of Mr Corcoran's private residence and business premises, and the seizure therefrom of certain items. In the event, the only item seized was Mr Corcoran's mobile telephone.

3. Mr Corcoran and the company which publishes the newspaper immediately instituted the within judicial review proceedings seeking to challenge the legality of this search and seizure. An arrangement has been put in place whereby An Garda Síochána are precluded from accessing the content of the mobile telephone pending the determination of the proceedings.

4. The gravamen of the Applicants' case is that the Oireachtas has failed to enact legislation which prescribes an appropriate procedure whereby court authorisation is required *prior* to the issuance of a search warrant in respect of premises or property belonging to a journalist. The Applicants submit, by reference to the case law of the European Court of Human Rights, that a procedure must be prescribed by law whereby a court can determine, prior to issuing a search warrant, whether a public interest which overrides the principle of protection of journalistic sources exists.

5. The shorthand "journalistic privilege" is employed in this judgment when referring to the right asserted on behalf of the Applicants, namely the right to resist the seizure and examination of Mr Corcoran's mobile telephone. However, for the reasons explained by the High Court (Hogan J.) in *Cornec v. Morrice* [2012] IEHC 376; [2012] 1 I.R. 804, such a shorthand is not entirely accurate. Strictly speaking, there is no such thing as "journalistic privilege". Rather, what the constitutional right seeks to protect is the

dissemination of information and public debate. Journalists are central to that entire process. The constitutional right would be meaningless if the law could not (or would not) protect the *general right* of journalists to protect their sources. This right is not absolute and may have to yield to other countervailing public interests, including, relevantly, the public interest in the proper investigation and prosecution of criminal offences.

STRUCTURE OF JUDGMENT

6. The legal challenge is advanced by reference both to the Constitution of Ireland ("***the Constitution***") and the European Convention on Human Rights ("***the European Convention***"). The Applicant contends that An Garda Síochána acted unlawfully in applying for a search warrant pursuant to section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as substituted).

7. The striking feature of the case, however, is that the Applicants have not sought to challenge the validity of the relevant statutory provision by reference to the Constitution. Nor have they sought a declaration of incompatibility pursuant to the provisions of the European Convention on Human Rights Act 2003. Rather, the Applicants' case, as refined at the hearing, is as follows. It is said that it is impermissible for An Garda Síochána to invoke the conventional search warrant procedure in any case where there is a *prima facie* claim of journalistic privilege. This is because the existing statutory procedure does not allow for the possibility of the consideration of a claim of journalistic privilege prior to the issuance of a search warrant. It is said that An Garda Síochána are required, instead, to institute proceedings before the High Court seeking the detention, preservation, or inspection of any property or thing pursuant to Order 50, rule 4 of the

Rules of the Superior Courts. The High Court would then carry out the requisite balancing exercise in those proceedings.

8. In order to determine whether the Applicants' case is well founded, it is necessary to address a number of issues as follows. First, the nature and extent of the right engaged under the Constitution must be examined. Whereas the case law recognises that, in certain circumstances, a journalist may be entitled—as a corollary of the right of freedom of expression—to withhold details of his or her confidential sources, the precise range of circumstances are not yet fully defined. Secondly, the meaning and effect of section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as substituted) must be considered. Thirdly, the legality of the search and seizure must then be ruled upon. Fourthly, if the search and seizure is found to be unlawful, the consequences which flow from that finding must be considered. Finally, in the event that the proceedings cannot be resolved by reference to the constitutional law issues, it will then become necessary to consider the implications, if any, of the European Convention on Human Rights Act 2003. Consideration of the European Convention issues should be deferred in circumstances where the principal claim made by the Applicants is that the search and seizure entailed a breach of their constitutional rights. If this claim is well founded, then the Applicants are entitled to a remedy in vindication of that right. See, by analogy, *Carmody v. Minister for Justice, Equality and Law Reform* [2009] IESC 71; [2010] 1 I.R. 635 (at paragraphs 49 to 51). It is only if this court finds that no breach of constitutional rights is involved that it would then become necessary to address the position under the European Convention.

9. The various issues identified above will be addressed, in sequence, under separate headings below. Before turning to that task, however, it is necessary first to set out a brief summary of the factual background against which the issues arise.

FACTUAL BACKGROUND

10. The first named applicant, Mr Corcoran, describes himself as a journalist and the editor of a local newspaper known as "*The Democrat*". The newspaper is said to be published by the second named applicant, Oncor Ventures Ltd. The newspaper is published on a monthly basis and also has an active online presence. Mr Corcoran is one of two directors of the applicant company. The other director is a solicitor, Mr Phelim O'Neill. Save where necessary to distinguish between the two applicants, the shorthand "***the Applicants***" will be used to refer to both applicants.

11. It is common case that, in the early hours of 16 December 2018, Mr Corcoran had attended at the scene of an alleged criminal incident in Falsk, Strokestown, County Roscommon. The alleged criminal incident is said to have involved the assault of a number of individuals who had been securing a dwelling house from which the occupants had earlier been evicted pursuant to court order. It is also alleged that criminal damage, consisting of the burning of a number of motor vehicles, had been carried out.

12. It appears from the affidavits filed on behalf of An Garda Síochána that two individuals have been charged with offences arising out of this alleged incident. The court was subsequently informed at the hearing in July 2020 that a number of other individuals have since been charged. It should be emphasised that no charges have been brought against Mr Corcoran personally.

13. Given that these criminal prosecutions are pending, it is not proposed to outline, in this judgment, the detail of the alleged offences as set out in the affidavits filed. It is sufficient for the purpose of these judicial review proceedings to note that the offences alleged are serious offences, and that, for the purposes of issuing search warrants, at least some of the offences constitute "arrestable offences" (as defined).

14. Mr Corcoran has explained his presence at the scene as follows in his first affidavit sworn herein on 4 April 2019 as follows.

> "6. I say that I was present at Falsk, Co. Roscommon on Sunday 16th December 2018 in my capacity as a newspaper editor and journalist at the aftermath of an incident at a house in which a number of vehicles were set on fire. I recorded video footage at the scene, in particular of the burning vehicles there. The Democrat newspaper published that video footage on line."

15. This explanation was subsequently elaborated upon as follows by Mr Corcoran in his second affidavit sworn herein on 14 October 2019.

> "19. I say that my attendance at the scene of the Falsk incident on 16 December 2018 was exclusively for *bona fide* journalistic purposes, in respect of a matter of considerable public interest which has become one of the most significant national news stories of the past year. The timing of my presence at the scene was as a consequence of 'tip offs' from confidential journalistic sources, the identity of which I am not entitled to reveal."

16. Mr Corcoran had attended for a voluntary interview with An Garda Síochána shortly after the events of 16 December 2018. A memorandum of this interview, which had been conducted under caution, has been exhibited by An Garda Síochána in their opposition papers. The interview is stated to have taken place on 19 December 2018, and had been conducted in the presence of Mr Corcoran's solicitor, Mr Phelim O'Neill.

17. It appears from the transcript that—when asked how he had first heard about the events at Falsk, Strokestown—Mr Corcoran asserted journalistic privilege.

18. It also appears that Mr Corcoran, through his solicitor, declined to make his mobile telephone available lest it compromise his journalistic sources. See page 7 of the transcript of the interview as follows.

> "Q: What device did you use to upload the video?
>
> A: No comment.
>
> Q: You said that you took photos at the scene what have you done with those?

A: No comment.

Q: Will you provide those to us?

Mr. Phelim O'Neill stated that the device used to record the video and that was used to upload the footage may compromise the source that brought his client to the site and therefore he is obviously declining to give information regarding it.

A: The photos are going to be published in the next edition of the newspaper but l am happy to give you copies of them all."

19. As appears, Mr Corcoran indicated that he would provide a copy of the digital photographs and video footage. On the following day, Mr Corcoran met Garda Sergeant Siggins by appointment at Roscommon Garda Station. Mr Corcoran handed over a USB stick containing videos and photographs of the aftermath of the scene at Falsk, Strokestown.

20. A number of months later, on 2 April 2019, members of An Garda Síochána applied to the District Court for two search warrants pursuant to section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. The first warrant-application related to the home of Emmet Corcoran, Bridge Street, Strokestown. The second warrant-application related to the business premises of what was described as the "Democrat.ie Newspaper" at Bridge Street, Strokestown, Co. Roscommon.

21. Each application had been grounded on an information sworn by Garda Sergeant Siggins. The content of the two informations is in almost identical terms, save that the warrant is being sought in respect of different premises. It is sufficient, therefore, to set out the content of one of the two, as follows.

> "THE INFORMATION of Sergeant Dermot Siggins of Castlerea Garda Síochána Station.
>
> Who says on oath:-
>
> I am a member of the Garda Síochána not below the rank of sergeant.

I have reasonable grounds for suspecting that –

evidence of, or relating to, the commission of an arrestable offence (within the meaning of section 2(1) of the Criminal Law Act 1997, as amended by section 8 of the Criminal Justice Act 2006), False Imprisonment, unlawful possession of a firearm, assault causing harm, criminal damage, is to be found at a place (within the meaning of section 10(6) of the Criminal Justice (Miscellaneous Provisions) Act 1997), namely Bridge Street, Strokestown, the home of Emmet Corcoran in the said court Strokestown, District Court Area No. 4 district.

The basis for such grounds is as follows –

In the early hours of the 16th December 2018 at Falsk, Strokestown, a group of approximately 30 men attacked a group of 8 security men with weapons and a firearm inflicting injuries on three of the security men. The immediate aftermath of the attack was recorded on a device which was handed over voluntarily by Emmet Corcoran to Sergeant Dermot Siggins at Roscommon Garda station on 20th December 2018. [NAME REDACTED] one of the injured parties alleges that when he was on the ground just after the attack a Peugeot vehicle pulled up, a male wearing square shape glasses, heavy set, approx. 5' 8", blue jeans, tan/brown dealer boots, was recording on his mobile phone, he was accompanied by a man in a balaclava who was wearing a camouflage jacket with DPM on it. He was in possession of a wood cudgel with a knotted head on. This video was recorded prior to the emergency services arriving. As the emergency services lights were seen the man in the balaclava told the other male that it was time to go. A video of the immediate aftermath of the incident was then posted online on Facebook page Democrat and also on Democrat.ie. These sites are co-owned by Emmet Corcoran and Phelim O'Neill. The description of the male given by the injured party matches the description of Emmet Corcoran who was present with the person with the balaclava at the scene. Furthermore the USB Hardrive handed over by Mr Corcoran was examined by the Computer Crime Cyber Unit which indicates this footage was downloaded from an iPhone 6 between the hours of 5:34hrs – 5:40hrs on the 16th December 2018. The article in both sites contains information that was not in the public domain unless the person who posted it was present at the scene. I believe from investigations carried out there are reasonable grounds to believe Emmet Corcoran was present at the attack and I believe an iphone 6 and further video footage which may identify other suspects sought in the investigation may be found on an iphone 6 or other computer or media device at Democrat.ie Newspaper, Bridge St, Strokestown, Co Roscommon and the home of Emmet Corcoran at Bridge St, Strokestown, Co. Roscommon.

And I hereby apply for the issue of a warrant under section 10(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as substituted by section 6(1)(a) of the Criminal Justice Act 2006) in respect of that place and any persons found at that place."

22. The informations were sworn in the chambers of Judge James Faughnan, and, on the basis of same, the District Court judge had been satisfied to issue the two search warrants. As discussed presently, one of the issues which now arises in these judicial review proceedings is whether the application should have been made to a different judge. (See paragraphs 117 to 121 below).

23. An Garda Síochána purported to execute the two warrants a number of days later, on 4 April 2019. Garda Sergeant Siggins has deposed that he had understood that Mr Corcoran was staying at his grandparents' house, and that he attended at that premises but that there had been no answer. Garda Sergeant Siggins goes on to depose that he had been approached by a lady on the street who identified herself as Mr Corcoran's sister, and that she stated that he had moved into the house next door. As discussed presently, the Applicants have pleaded that An Garda Síochána were not entitled to rely on a single warrant to search multiple addresses which happened to be on the same street. (See paragraphs 122 to 124 below).

24. The precise nature of the exchanges between Mr Corcoran and Garda Sergeant Siggins are in dispute. It appears to be common case, however, that Mr Corcoran ultimately handed over his mobile telephone, but that he declined to provide the password which would allow the content of the device to be accessed.

THESE JUDICIAL REVIEW PROCEEDINGS

25. The mobile telephone had been seized on the morning of 4 April 2019. The Applicants moved with alacrity thereafter, and made an *ex parte* application to the High Court for leave to apply for judicial review that very afternoon. The High Court (Noonan J.), as part of the order granting leave, made an order temporarily restraining An Garda Síochána from examining or otherwise attempting to access information on the mobile

telephone. The matter was made returnable to the High Court the following day. On the return date, An Garda Síochána gave an undertaking not to examine or otherwise attempt to access information on the mobile telephone pending further order.

26. Prior to their filing opposition papers, An Garda Síochána had written an open letter to the Applicants' solicitors dated 10 May 2019 offering to compromise the proceedings on certain terms. The essence of the offer was that the examination of the contents of the mobile telephone would be limited to the following items.

    (i) The telephone calls to and from the phone for the period of the 11th – 17th December, 2018 inclusive;

    (ii) The emails and text messages, including other social media messaging services such as Whatsapp, Facebook Messenger etc., sent from and received to the phone for the period of the 11th – 17th December, 2018 inclusive;

    (iii) The images contained on the memory of the phone which were either captured, uploaded or placed onto the phone in the period of the 11th – 17th December, 2018 inclusive;

    (iv) The videos which were recorded, uploaded or otherwise placed on the phone in the period of the 11th – 17th December, 2018 inclusive;

    (v) Other information contained in the phone which was uploaded to it in the period of the 11th – 17th December, 2018 inclusive.

27. The Applicants, through their solicitors, responded to this letter on 13 August 2019 indicating that their clients had never had any difficulty with providing videos and photographs taken at the scene of the relevant incident to investigating members of An Garda Síochána, and had already done so voluntarily. The letter indicated agreement to items (iii) and (iv) above only.

28. An Garda Síochána made a substantive response by letter dated 1 November 2019. The rationale for the dates was explained as follows.

> "The period from the 11th – 17th December, 2018 is a specific, considered, proportionate and reasonable timeframe having regard to the issues that have to be explored in the criminal investigation, including in the days leading up to the 16th December 2018 and in the aftermath. The criminal offences perpetrated on the 16th December, 2018 were organised, planned and pre-meditated. Accordingly, events in the days before the 16th December, 2018 are relevant to the Garda investigation.
>
> The 11th December, 2018 has been identified by An Garda Siochana as the appropriate starting point because security personnel, some of whom were victims of serious criminal offences on the 16th December, 2018, took possession of the premises in question on the 11th December, 2018 and were on-site from that date onwards.
>
> Therefore, the 11th December 2018 is the appropriate point to begin an examination of the phone where the investigation team wish to have access to the materials that can provide corroborative evidence about the events on the 16th December, 2018 having regard to the fact that it was a planned and pre-meditated operation by those involved.
>
> Moreover, one of the issues which An Garda Siochana is investigating is the presence of the First Applicant, Mr. Corcoran, at the scene and the context in which he was there. This includes the question of who, if anybody, may have accompanied him to the scene on the night in question and what, if anything, any such person accompanying Mr Corcoran may have done at the scene.
>
> The First Applicant has acknowledged during the course of the cautioned interview with him on the 19th December, 2018 that he travelled to the scene in his own Peugeot 407 vehicle on the night in question.
>
> An investigation of these matters must be carried out by reference to the relevant materials, which includes the phone material which is being sought from the First Applicant's phone. These are matters concerning criminal conduct of a serious nature.
>
> The end date that is set out in the letter of the 10th May, 2019 refers to the 17th December, 2018, which is the day after the events in Falsk, Strokestown, Co. Roscommon. This is an appropriate cut-off point at the present time as the organisation, planning and carrying out of these criminal activities also encompasses a time-period after the events in question. In those circumstances it would be appropriate, as part of the investigation, to examine the relevant materials on the

> phone for a short period after the 16th December, 2018 and that short period is for one additional day until the 17th December, 2018."

29. In the event, the parties were unable to reach an agreement and the proceedings did not settle.

30. The application for judicial review came on for full hearing before me on three days commencing on 14 July 2020. In circumstances where, during the course of the hearing, each party refined its position on what it said was the correct interpretation of the statutory provisions governing the issue of the impugned search warrants, the parties were given liberty to file supplemental written submissions on a staggered basis. An Garda Síochána filed their submissions on 29 July 2020; and the Applicants filed their replying submissions on 4 September 2020. Both parties were agreed that there was no requirement to reopen the oral hearing.

31. Finally, for the sake of completeness, it should be noted that the second named respondent, the Director of Public Prosecutions, has not participated in these proceedings.

FREEDOM OF EXPRESSION UNDER THE CONSTITUTION

32. Article 40.6.1°.i of the Constitution provides as follows.

> 6 1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality:–
>
> i The right of the citizens to express freely their convictions and opinions.
>
> The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

> The publication or utterance of seditious or indecent matter is an offence which shall be punishable in accordance with law.
>
> […]

33. The starting point for the analysis of this constitutional right is the judgment of the Court of Criminal Appeal in *Re O'Kelly* (1974) 108 I.L.T.R. 97. On the facts of that case, a journalist had appealed the sentence imposed upon him in respect of his refusal to confirm in the context of criminal proceedings that he had carried out an interview with a self-described member of the Provisional IRA.

34. Having cited Article 40.6.1° of the Constitution, Walsh J. then stated as follows.

> "Subject to these restrictions, a journalist has the right to publish news and that right carries with it, of course, as a corollary the right to gather news. No official or governmental approval or consent is required for the gathering of news or the publishing of news. It is also understandable that newsmen may require informants to gather news. It is also obvious that not every newsgathering relationship from the journalist's point of view requires confidentiality. But even where it does journalists or reporters are not any more constitutionally or legally immune than other citizens from disclosing information received in confidence. The fact that a communication was made under terms of expressed confidence or implied confidence does not create a privilege against disclosure. So far as the administration of justice is concerned the public has a right to every man's evidence except for those persons protected by a constitutional or other established and recognised privilege."

35. The judgment in *Re O'Kelly* had been delivered shortly after the seminal judgment of the Supreme Court in *Murphy v. Corporation of Dublin* [1972] I.R. 215. In that judgment, the Supreme Court had emphasised that the decision as to the compellability of the production of evidence is a matter for the judicial power. The judgment had arisen in the context of an application for discovery in proceedings against a Minister of State. The Minister had purported to assert privilege from disclosure, certifying that the production of the disputed document would be contrary to public policy and detrimental to the public interest concerned. The Supreme Court rejected this assertion of privilege, and

emphasised the importance of the role of the court in determining what evidence should be heard. See page 233 of the reported judgment as follows.

> "The present claim of privilege is that in a civil action the executive organ of government may by its own judgment withhold relevant evidence from the organ of government charged with the administration of justice and engaged in the determination of the rights of the litigants, and that this may be done when the claim of privilege is made on either or both of the grounds already mentioned.
>
> Under the Constitution the administration of justice is committed solely to the judiciary in the exercise of their powers in the courts set up under the Constitution. Power to compel the attendance of witnesses and the production of evidence is an inherent part of the judicial power of government of the State and is the ultimate safeguard of justice in the State. The proper exercise of the functions of the three powers of government set up under the Constitution, namely, the legislative, the executive and the judicial, is in the public interest. There may be occasions when the different aspects of the public interest 'pull in contrary directions'—to use the words of Lord Morris of Borth-y-Gest in *Conway v. Rimmer*. If the conflict arises during the exercise of the judicial power then, in my view, it is the judicial power which will decide which public interest shall prevail. This does not mean that the court will always decide that the interest of the litigant shall prevail. It is for the court to decide which is the superior interest in the circumstances of the particular case and to determine the matter accordingly."

36. The principles in *Murphy* were applied, by analogy, in the context of in *Re O'Kelly* as follows.

> "As was pointed out in that case [*Murphy v. Corporation of Dublin*], there may be occasions when different aspects of the public interest may require a resolution of a conflict of interests which may be involved in the disclosure or nondisclosure of evidence but if there be such a conflict then the sole power of resolving it resides in the courts. The judgment or the wishes of the witness shall not prevail. This is the law which governs claims for privilege made by the executive organs of State or by their officials or servants and journalists cannot claim any greater privilege. The obligation of all citizens, including journalists, to give relevant testimony with respect to criminal conduct does not constitute a harassment of journalists or other newsmen. If a journalist were to be invited to witness the commission of a crime in his capacity as a journalist and received the invitation only because of that capacity, the courts could not for a moment entertain a claim that he should be privileged from giving evidence of what he had witnessed simply because of the fact that he was there as a journalist. In the present state of the criminal law, in

> such a case a journalist concealing such knowledge, like any other person in a similar position might well find himself guilty of misprision of felony where a felony was concerned."

37. Counsel for An Garda Síochána has attached particular significance to the statement to the effect that a journalist asserting that he had attended to witness the commission of a crime in his capacity as a journalist is not *per se* entitled to refuse to provide evidence. Counsel did concede, however, that the position as stated in more recent authorities allows for greater protection of journalistic sources.

38. The limits of the judgment in *Re O'Kelly* have been emphasised by the High Court (Hogan J.) in *Cornec v. Morrice* [2012] IEHC 376; [2012] 1 I.R. 804. In particular, Hogan J. emphasised, first, that the matter had come before the Court of Criminal Appeal as an appeal against the severity of the sentence only, and not against the underlying conviction for contempt of court; and, secondly, the claim for journalistic privilege was misconceived in circumstances where no journalistic privilege could have attended Mr O'Kelly's evidence precisely because the open identification of Mr MacStiofáin as "Chief of Staff" was itself an intrinsic part of the entire broadcast. Hogan J. stated that a journalist could only possibly assert privilege where the identity of the person in the broadcast was itself confidential and withheld from the listeners or viewers, such as might occur where, for example, the interview was with the victim of a sexual assault.

39. Hogan J. went on then to identify the values protected by Article 40.6.1° of the Constitution as follows (at paragraphs 42 and 43).

> "While I have thus far loosely spoken of a journalistic privilege, there is, in fact, in strictness, no such thing. The protection is rather the high value which the law places on the dissemination of information and public debate. Journalists are central to that entire process, a point expressly recognised by Article 40.6.1°.i of the Constitution itself when it recognises 'their rightful liberty of expression' on the part of the press, albeit counter balanced by the stipulation that this rightful liberty shall not be used to undermine 'public order or morality or the authority of the State'. Perhaps these constitutional fundamentals have been overlooked at times, in part possibly because

> the syntax and drafting of this particular clause is (uncharacteristically) awkward given that the critical proviso is somewhat obscured by being placed within a subordinate clause. The Irish language version is actually much clearer than its English language counterpart, since the privileged status of the organs of public opinion is more elegantly described, not least given that it is set out in a stand alone sentence at the end of the relevant second paragraph.
>
> Irrespective, however, of the languages used, the constitutional right in question would be meaningless if the law could not (or would not) protect the general right of journalists to protect their sources. This would be especially true of the particular example of that rightful liberty afforded by Article 40.6.1°.i which is expressly enumerated therein - criticism of Government policy ('tuairimí léirmheasa ar bheartas an Rialtais') - if no such protection were available."

40. The judgment goes on to explain that the right is not absolute or inviolable, and may be overridden by a court by reference to some general balancing test based on the public interest. Hogan J. emphasises that the public interest in ensuring that journalists can protect their sources remains very high, since journalism is central to the free flow of information which is essential in a free society.

41. The judgment also addresses the equivalent protections afforded under the European Convention, and suggests that the overlap between the two instruments with regard to the role of the media is virtually a complete one. Hogan J. does, however, draw attention to the fact that while Article 10 of the European Convention does not, in terms, privilege the media in the same way as Article 40.6 of the Constitution does, the protection of journalistic sources is, subject to appropriate exceptions, accordingly, regarded as a core value protected by the European Convention.

42. On the facts of *Cornec v. Morrice*, the High Court held that the case for compelling a journalist to give evidence in support of foreign proceedings had not been convincingly established. One of a number of factors which informed this decision was that the foreign proceedings were merely commercial proceedings, albeit for very significant sums of money. Hogan J. suggested that the public interest in disclosure was not as compelling

as would have been the case, for example, where the potential innocence of a third party was at stake in criminal proceedings.

43. The approach in *Cornec v. Morrice* has been followed by the High Court (Meenan J.) in *Ryanair Ltd v. Channel 4 Television Corporation* [2017] IEHC 651; [2018] 1 I.R. 734. Meenan J. set out the following helpful summary of the principles (at paragraph 65 of his judgment).

> "It seems to me that from the foregoing authorities a number of principles concerning journalistic privilege can be stated:-
>
> (i) the protection afforded by journalistic privilege protects not only the identity of source(s) but, where necessary, the information provided by such source(s);
>
> (ii) unlike legal advice/litigation privilege journalistic privilege is not absolute and may be displaced following a balancing exercise carried out by the court between, on the one hand, the right to freedom of expression and, on the other hand, a legal right such as a person's right to a good name;
>
> (iii) a heavy burden rests on the person who seeks disclosure of journalistic source(s). The court must be satisfied that such disclosure is justified by an overriding requirement in the public interest or is essential for the exercise of a legal right."

44. Finally, it is necessary to consider the judgment of the Supreme Court in *Mahon v. Keena* [2009] IESC 64; [2010] 1 I.R. 336; [2009] 2 I.L.R.M. 373. Given the precedential value of this judgment, it being the leading judgment of the Supreme Court on journalistic privilege, discussion of same has deliberately been left until last. (This discussion is out of chronological sequence in that the Supreme Court judgment had been delivered on 31 July 2009, i.e. prior to the two High Court judgments discussed above).

45. The proceedings in *Mahon v. Keena* concerned the publication, by a national newspaper, of materials which had been circulated in confidence by a tribunal of inquiry ("***the tribunal***"). The tribunal had been investigating an allegation that a well-known politician had received financial payments while serving as Minister for Finance. The tribunal had

intended to investigate this allegation in private, in the first instance, in advance of making a decision on whether to proceed to a public hearing. To this end, letters setting out the allegation had been circulated to a small number of interested parties. The tribunal claimed that it had the power to impose an obligation of confidentiality on the recipient of such letters.

46. A copy of such a letter had been furnished—unsolicited and anonymously—to a journalist with *The Irish Times* newspaper. The newspaper subsequently published details of the content of the letter. The journalist and the editor then destroyed all copies of the letter held by them.

47. The tribunal maintained that the unauthorised disclosure and publication of confidential material, which had been circulated by it as part of its preliminary private phase of investigation, were damaging to it. In particular, the tribunal expressed a concern that the cooperation of individuals with its investigations was dependent on the extent of its ability to ensure confidentiality. The tribunal made certain orders directing the journalist and editor to answer questions about the source of the unauthorised disclosure and the publication of the newspaper article. The matter subsequently came before the High Court by way of an application by the tribunal, pursuant to section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997, seeking orders from the High Court compelling the journalist and editor to comply with the tribunal's orders. The matter ultimately came before the Supreme Court on appeal.

48. The judgment of the Supreme Court contains a careful analysis of the relevant case law of the European Court of Human Rights ("***the ECtHR***") on journalistic privilege. Crucially, however, the judgment explains (at paragraph 66) that no conflict arose in that case between the provisions of the European Convention and those of the Constitution; and that, in the event of such a conflict, it is the Constitution which must prevail.

49. It is implicit, therefore, that principles similar to those identified in the specific case law of the ECtHR relied upon by the Supreme Court will, generally, apply to the constitutional rights protected under Article 40.6.1°.i of the Constitution. There may, of course, be exceptions, and the constitutional right may differ in some respects from that under Article 10. For present purposes, however, the requirement that any restriction on freedom of expression must be "convincingly established" is one common to both the Constitution and the European Convention.

50. The Supreme Court cited with approval the following passage from *Goodwin v. United Kingdom* (Application No. 17488/90) (at paragraph 39).

> "Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms (see, amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at 4 European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalists' Sources by the European Parliament, 18 January 1994, Official Journal of the European Communities no. C 44/34). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

51. The Supreme Court went on to observe that the ECtHR had laid emphasis on the need for any restriction on freedom of expression to be "convincingly established", and that "limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the court".

52. The public interest upon which the tribunal sought to rely was the prevention of the disclosure of information received in confidence (Article 10.2 of the European

Convention). The Supreme Court accepted that the tribunal had the right and duty to protect confidential information communicated to it, and by it, during its private investigative phase. This right had to be balanced against the public interest in the protection of journalistic sources. The information in question, relating, as it did, to allegations of the payment of monies to an important political figure, was a matter of public interest, which a newspaper would, in the ordinary way, be entitled to print.

53. In carrying out the balancing exercise, the Supreme Court carefully considered the benefit, if any, which would accrue to the tribunal were the journalist and the editor compelled to answer questions. It seems that, in circumstances where the leaked copies of the letter had been destroyed, the principal objective of the questioning would be to ascertain whether the version of the letter received by the journalist had had the tribunal's letter heading on it and whether it had been signed. It seems that the tribunal considered that the answer to this question would allow it to deduce whether the unauthorised disclosure had come from within or outwith the tribunal itself. For example, if the letter had not been engrossed and signed, it could be inferred that the source of the leak was a person within the tribunal who had printed off a copy of the letter on plain paper.

54. The Supreme Court was sceptical as to the utility of the proposed questioning. See paragraph 96 of the judgment as follows.

> "If the 'leaked' document was not headed and thus, as a matter of probability, came from a tribunal source, that might possibly assist the tribunal in its endeavour to identify the source. At the same time, a number of other hypotheses cannot be excluded. One must recall that the person 'leaking' the document would, in all probability, have wished to disguise the source. Thus, by the use of a photocopying machine, the heading might be removed from an original letter. Equally, an original might have been photocopied prior to its despatch from the tribunal."

55. The Supreme Court held that it was very difficult to discern any sufficiently clear benefit to the tribunal, i.e. from any answers to the questions they wished to pose, so as to justify

the making of an order compelling the journalist and editor to answer questions for the purpose of identifying their source. The questioning was not, therefore, justified by an overriding requirement in the public interest.

56. The outcome of *Mahon v. Keena* thus turned largely on the peculiar facts of the case, and, specifically, on the fact that the source had been anonymous. The finding appears to have been informed primarily by a consideration of the lack of proportionality between the benefit to the tribunal of inquiry and the damage to the journalist sources.

57. Much of the judgment is also taken up with the legal consequences of the conduct of the journalist and editor in destroying their copies of the letter. The High Court, at first instance, had held that this "reprehensible conduct" was a relevant consideration to which great weight must be given in striking the correct balance between the competing rights and interests. The Supreme Court, on appeal, while sharing the view that the conduct was reprehensible, did not agree that this was relevant to the narrower question of whether, in circumstances where the documents no longer exist, there is a logical or causal link between that act and the order made. The Supreme Court held that the great weight which the High Court attached to the reprehensible conduct in destroying documents had led it to adopt an erroneous approach to the balancing exercise. This was because once the High Court had devalued the journalistic privilege so severely, the balance had not been properly struck.

58. Relevantly for the purposes of the present case, the Supreme Court emphasised that any claim for journalistic privilege can only be adjudicated upon by the courts. See paragraph 92 of the judgment as follows.

> "[…] At this point, I raise the question as to whether it can truly be said to be in accord with the interests of a democratic society based on the rule of law that journalists, as a unique class, have the right to decide for themselves to withhold information from any and every public institution or court regardless of the existence of a compelling need, for example, for the production of evidence of the commission

> of a serious crime. While the present case does not concern information about the commission of serious criminal offences, it cannot be doubted that such a case could arise. Who would decide whether the journalist's source had to be protected? There can be only one answer. In the event of conflict, whether in a civil or criminal context, the courts must adjudicate and decide, while allowing all due respect to the principle of journalistic privilege. No citizen has the right to claim immunity from the processes of the law."

59. Whereas this statement had been made in the specific context of the destruction of the documents, it has an obvious resonance with the comments of the Court of Criminal Appeal in in *Re O'Kelly*. (See paragraphs 34 to 36 above).

Summary of principles

60. The principles established by the foregoing case law might be summarised as follows.

(i). The Constitution protects not only the right of the citizens to express freely their convictions and opinions, but also the right of organs of public opinion—such as the radio, the press, the cinema—to liberty of expression.

(ii). These rights are not absolute or inviolable, and may be overridden by a court by reference to some general balancing test based on the public interest.

(iii). It follows as a corollary of these express rights that a journalist may, in certain circumstances, have an implied or derived right to protect the identity of their confidential sources. This right is seen as necessary to allow journalists to investigate and report on matters of public interest. A person might only be prepared to engage with a journalist if their identity as a source is protected. For example, an employee who wishes to report wrongdoing by their employer may be fearful of reprisals if they were to be identified as the source of a story.

(iv). The right to protect a source is not absolute or inviolable. The judgment in *Re O'Kelly* (1974) 108 I.L.T.R. 97 suggests that this right may well be outweighed by the obligation of all citizens, including journalists, to give relevant testimony

with respect to criminal conduct. Whereas the more recent judgments have attached greater importance to the protection of journalistic sources, the special position of criminal proceedings has nevertheless been adverted to in those judgments.

(v). The balancing exercise must be carried out by a court of law. It is not enough that a journalist simply asserts privilege: the claim must be adjudicated upon by a court. A journalist is not entitled to pre-empt such an adjudication, by deciding unilaterally to destroy documents deliberately in response to a request for disclosure.

(vi). In all of the case law discussed above, the question of journalistic privilege had come before the court by way of a specific procedural mechanism, e.g. an application to enforce the orders of a tribunal of inquiry, an application for the discovery of documents in civil proceedings, or an application for letters rogatory. As discussed presently, one of the principal disputes between the parties in the within proceedings concerns the identification of the procedural mechanism by which, and the forum before which, the Applicants' claim for journalistic privilege is to be determined. Both sides are now agreed that it does not fall for determination by the District Court in the context of an application to issue a search warrant.

(vii). The case law has not addressed the issuing and execution of a *search warrant* against a journalist. In particular, the courts have not yet had to consider the chilling effect which such actions may have on a journalist (even in instances where no material is discovered). This has, however, been addressed in detail in the case law of the ECtHR.

CRIMINAL JUSTICE (MISCELLANEOUS PROVISIONS) ACT 1997

61. The search warrant which purported to authorise the search of the Applicant's home and business had been issued pursuant to section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as amended). A new form of wording had been substituted for the original by the Criminal Justice Act 2006. Insofar as relevant, the section, as substituted, now reads as follows.

> 10.(1) If a judge of the District Court is satisfied by information on oath of a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.
>
> (2) A search warrant under this section shall be expressed, and shall operate, to authorise a named member, accompanied by such other members or persons or both as the member thinks necessary—
>
> (a) to enter, at any time or times within one week of the date of issue of the warrant, on production if so requested of the warrant, and if necessary by the use of reasonable force, the place named in the warrant,
>
> (b) to search it and any persons found at that place, and
>
> (c) to seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that that member reasonably believes to be evidence of, or relating to, the commission of an arrestable offence.
>
> (3) A member acting under the authority of a search warrant under this section may—
>
> (a) require any person present at the place where the search is being carried out to give to the member his or her name and address, and
>
> (b) arrest without warrant any person who—
>
> (i) obstructs or attempts to obstruct the member in the carrying out of his or her duties,
>
> (ii) fails to comply with a requirement under paragraph (a), or

(iii) gives a name or address which the member has reasonable cause for believing is false or misleading.

(4) A person who obstructs or attempts to obstruct a member acting under the authority of a search warrant under this section, who fails to comply with a requirement under subsection (3)(a) or who gives a false or misleading name or address to a member shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both.

(5) The power to issue a warrant under this section is without prejudice to any other power conferred by statute to issue a warrant for the search of any place or person.

62. The term "arrestable offence" is defined by section 2 of the Criminal Law Act 1997 (as amended by section 8 of the Criminal Justice Act 2006) as follows.

> "arrestable offence" means an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment or the common law, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence;

63. Counsel for An Garda Síochána has drawn attention to the provisions of section 26 of the Criminal Justice (Amendment) Act 2009, which states that an application under any enactment to a court, or a judge of a court, for a search warrant shall be heard otherwise than in public. Reference is also made to *Walsh on Criminal Procedure* (second edition, Round Hall, 2016) at para. 10-184 as follows.

> "It has always been regular practice for an application to a court or judge for a search warrant to be made ex parte and in private. Frequently, the value of a warrant will be dependent on the element of surprise which will be lost if the property owner, for example, is given advance notice of the application. Surprisingly, however, this practice was not based on statutory authority and, as such, sat uneasily with the constitutional principle that justice should be administered in public. The omission was remedied by the Criminal Justice (Amendment) Act 2009 which states that where an application for a search warrant is made under any enactment to a court or judge of a court, it must be made otherwise than in public."

64. Counsel for An Garda Síochána also helpfully referred to a number of the leading judgments on the issuance of search warrants, including, in particular, *Damache v.*

Director of Public Prosecutions [2012] IESC 11; [2012] 2 I.R. 266. The dispute in *Damache* had centred on the requirement that authorisation for a search warrant be obtained from an independent decision-maker. On the facts, the search warrant had purportedly been authorised by a member of the An Garda Síochána team which was investigating the alleged offences. The Supreme Court held that a member of An Garda Síochána, who is part of an investigating team, cannot be regarded as independent on matters related to the investigation.

65. For present purposes, the relevance of the judgment lies in its discussion of the function to be exercised by the relevant decision-maker. The following statements at paragraphs 17, 36, 47, and 51 were relied upon by counsel.

> [17] The issuing of a search warrant is an administrative act, but it must be exercised judicially. It was accepted that the full panoply of rights do not apply to the issuing of search warrants. Obviously, the law does not require that suspects be put on notice of applications to apply for a search warrant. But, it was submitted on behalf of the appellant, there should be independent and impartial supervision of the issuing of a warrant.
>
> [36] There are two aspects of the issuance of a search warrant which are important. First, that a search warrant be issued by an independent person. Secondly, that such a person must be satisfied on receiving sworn information, that there are reasonable grounds for a search warrant.
>
> [47] The procedure for obtaining a search warrant should adhere to fundamental principles encapsulating an independent decision maker, in a process which may be reviewed. The process should achieve the proportionate balance between the requirements of the common good and the protection of an individual's rights. To these fundamental principles as to the process there may be exceptions, for example when there is an urgent matter.
>
> [51] The court applies the following principles. For the process in obtaining a search warrant to be meaningful, it is necessary for the person authorising the search to be able to assess the conflicting interests of the State and the individual in an impartial manner. Thus, the person should be independent of the issue and act judicially. Also, there should be reasonable grounds established that an offence

> has been committed and that there may be evidence to be found at the place of the search.

66. Reference was also made to *Simple Imports Ltd v. Revenue Commissioners* [2000] IESC 40; [2000] 2 I.R. 24. This case concerned the interpretation of a statutory provision which allowed for the issuance of a search warrant in favour of the Revenue Commissioners. The statutory provision required that the customs officer must have reasonable grounds for his suspicion that certain prohibited goods are on the premises to be searched; and, secondly, that the District Court be satisfied from information on oath given by the officer that the officer had reasonable suspicion.

67. Keane J. (as he then was) emphasised the importance of a judge satisfying themselves that the relevant preconditions to the issuing of a search warrant have been satisfied (at page 250 of the reported judgment).

> "Parliament, in stipulating that the power to issue the warrants now under consideration was to be vested in judges and could be exercised by them only provided certain preconditions were met, recognised that the citizen was entitled to such protection. It must be presumed that it was envisaged that the judges would, in no sense, permit themselves to be treated as ciphers, but would conscientiously satisfy themselves that the relevant preconditions had been satisfied.
>
> […]
>
> "While the syntax is rather odd, the meaning is clear: the District Judge, before issuing the warrant, must have come to the conclusion, from the information on oath of the customs officer, not merely that he (the officer) suspects that there are uncustomed or prohibited goods on the particular premises but that his suspicion is 'reasonable'. The District Judge is no doubt performing a purely ministerial act in issuing the warrant. He or she does not purport to adjudicate on any *lis* in issuing the warrant. He or she would clearly be entitled to rely on material, such as hearsay, which would not be admissible in legal proceedings. It is to be presumed, moreover, that the district judge, in issuing the warrant, will act in accordance with the requirements of the relevant legislation and the onus of establishing that he or she failed to do so rests on the person challenging the validity of the warrant."

68. Counsel draws attention to the fact that both judgments emphasise that the issuance of a warrant is a ministerial, rather than judicial, function, and that it is done on an *ex parte* basis. Similar principles are said to apply to section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997.

FINDINGS OF THE COURT ON INTERPRETATION OF SECTION 10

Preliminary observations

69. Given the manner in which the claim has been pleaded—and initially argued—the primary issue to be determined by this court must be the meaning and effect of section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. Before turning to consider this issue directly, it may be useful, first, to address two points of general principle as follows.

70. The first is the extent, if any, to which the court's interpretation of the statutory provision is constrained by the particular circumstances of this case. As appears from the summary of the factual background above, one of the peculiarities of the present case is that the Applicants had been in a position to institute the within proceedings within a matter of hours of the search and seizure, and prior to the police authorities being able to access the password-protected content of the mobile telephone. Counsel for An Garda Síochána has latched on to this sequence of events to argue that the availability of judicial review represents a meaningful procedural safeguard and that the issue of journalistic privilege can, if appropriate, be determined in the judicial review proceedings. All of this, it is suggested, negates any necessity to have to "read in" additional procedural safeguards in respect of section 10.

71. Counsel submits that the Applicants are not entitled to put forward hypothetical scenarios which might suggest that judicial review would not be an adequate remedy in certain cases. The Applicants are not entitled to rely on *ius terti*, i.e. the rights of hypothetical

third parties, by arguing that judicial review would not be an adequate remedy in cases where the material in respect of which journalistic privilege is asserted is *immediately* accessible. The statutory provisions should, it is said, be interpreted by reference to the actual circumstances of the case.

72. The second point of general principle concerns the application of the double construction rule. This rule, as summarised in *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317 (at 341), is to the effect that an Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution. The specific issue which now arises is whether the double construction rule is applicable in a case, such as the present, where there is no challenge to the constitutional validity of the relevant statutory provision. The resolution of this issue may turn, to an extent, on whether one characterises the double construction rule as a remedial principle rather than simply a rule of statutory interpretation. See *Kelly: The Irish Constitution* (Hogan, Whyte, Kenny and Walsh, fifth edition, Bloomsbury Professional, 2018) at §6.2.283 to §6.2.286.

73. It seems to me that useful guidance on both of these issues is to be found in the judgment of the Supreme Court in *Callaghan v. An Bord Pleanála* [2017] IESC 60. This judgment concerned the proper scope of an appeal pending before the Supreme Court, and, in particular, the question of whether the appellant was entitled to rely on arguments based on an EU Directive in circumstances where it had not been expressly referenced in the points upon which leave to appeal had been granted. The Supreme Court held, by analogy with the approach taken to constitutional law, that the terms of the EU Directive might be relevant to the issue of statutory interpretation. Clarke C.J. stated as follows (at paragraph 4.4 of the judgment).

> "Where an Irish court is considering the proper interpretation of a statutory measure it may well take into account any constitutional

> principles which might impact on the proper construction of the legislation concerned. Indeed, it is fair to say that a court might very well be reluctant to disregard such constitutional questions of interpretation even if they were not specifically raised by the parties. A court, and in particular a court of final appeal, is, as a matter of national law, required to give a definitive interpretation of a legislative measure which comes into question in the course of proceedings properly before it. It could not be ruled out, therefore, that a court in such circumstances would be reluctant to give a construction to legislation without having regard to any constitutional issues which might impact on the proper construction of the measure concerned in accordance with *East Donegal* principles. This might well be so where there would be a real risk that the Court would give an incorrect interpretation of the legislation in question if it did not itself raise the constitutional construction issue. It must be recalled that the proper interpretation of legislation is objective and is not dependent, necessarily, on the arguments put forward by the parties."

74. These principles apply, by analogy, to the present case. In particular, given that the Applicants' entire case is predicated on an asserted *constitutional right* of journalistic privilege, it would be artificial to ignore the constitutional issues when interpreting the statutory provisions governing the issuance of the search warrant. This necessitates the application of the double construction rule, notwithstanding the absence of a challenge to the constitutional validity of the section. This is especially so where the Applicants are also relying on rights under the European Convention. This court is obliged, under section 2 of the European Convention on Human Rights Act 2003, to interpret and apply a statutory provision in a manner compatible with the State's obligations under the European Convention. (The provisions of section 2 are set out in full at paragraph 110 below). A failure to apply the double construction rule when addressing the constitutional issues might have the anomalous result that a court would be confined to a literal interpretation for the purposes of the constitutional issues, yet adopt a more expansive interpretation for the purposes of the convention issues. This would be contrary to the general approach directed by the Supreme Court in *Carmody v. Minister*

for Justice, Equality and Law Reform [2009] IESC 71; [2010] 1 I.R. 635 (at paragraphs 49 to 51).

75. The correct statutory interpretation cannot, therefore, be dictated by the specific facts of this case. Rather, this court must consider whether it might be legitimate to read procedural safeguards into section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. This is so notwithstanding that the happenstance of the content of the mobile telephone being password-protected meant that, in this particular case, judicial review was available in time to offer a useful remedy to the Applicants.

Interpretation of section 10

76. I turn now to consider the correct interpretation of section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. The relevant parts of the section have been set out earlier (at paragraph 61 above). As appears, the function of the District Court is set out in concise terms. The District Court is required to be satisfied that there are "reasonable grounds" for suspecting that evidence of, or relating to, the commission of an arrestable offence (as defined) is to be found in the place in respect of which the warrant is sought. The Oireachtas has determined that the potential interference with the property and privacy rights of a person affected by a search warrant is justified by the public interest in the investigation and prosecution of serious criminal offences provided that this "reasonable grounds" criteria is met. The legislation does not expressly address other rights which may be affected by the execution of a search warrant. No provision is made, for example, for the contingency of seized material being protected by legal professional privilege. In practice, An Garda Síochána would, presumably, adopt the pragmatic approach of not examining any material in respect of which legal professional privilege is claimed, pending an adjudication by a court on such a claim

77. The section does not, in terms, make any reference to a distinction between participants and non-participants in the alleged criminal offence, still less does it make any reference to the position of a journalist. On its face, therefore, there is nothing in the section which requires either the police authorities who are seeking the warrant, or the District Court, to consider the position of a journalist or the need to protect journalistic sources.

78. Both parties have confirmed, in their supplemental legal submissions, that they do not contend for an interpretation of the section which would require the District Court to carry out a balancing of rights for the purposes of Article 40.6.1°.i of the Constitution.

79. It is implicit from the structure of the section, and from the fact that, under the Criminal Justice (Amendment) Act 2009, proceedings for the issuance of a search warrant are to be held otherwise than in public, that an application for a search warrant is to be made on an *ex parte* basis. The legal effect of a search warrant, as provided for in the balance of the section, and the coercive nature of the powers conferred upon the members of An Garda Síochána executing a warrant, are consistent only with a requirement for an element of surprise.

80. An interpretation of the section which excludes the possibility of an *inter partes* hearing would have the consequence that no balancing exercise of the type contended for by the Applicants can be carried out in the context of an application for a search warrant. It might be tempting, therefore, to adopt a more expansive interpretation which would allow for an *inter partes* hearing. This would have the perceived benefit of ensuring full compliance—assuming for argument's sake that same is mandatory—with the procedural requirements contended for by the Applicants.

81. I have concluded that the section cannot be interpreted in this way. Not only would such an expansive interpretation run counter to the implicit legislative preference for an *ex parte* hearing, it would also necessitate reading a series of additional provisions into the

section to give it practical effect. This is because any requirement for an *inter partes* hearing would be largely meaningless unless the District Court has jurisdiction to adjudicate on a claim for journalistic privilege, and has power to put in place interim measures pending such adjudication. There are a number of different mechanisms by which this might be achieved. A template of the type of legislative measures which *might* be put in place is provided by the Police and Criminal Evidence (Northern Ireland) Order 1989 discussed in the judgment of the Court of Appeal of Northern Ireland in *Fine Point Films* [2020] NICA 35 (relied upon by the Applicants). As appears, the legislation there envisages an *inter partes* application in most instances, with the respondent journalist being under an obligation not to conceal, destroy, alter or dispose of the material to which the application relates, except with the leave of the judge or the written permission of a constable, until the proceedings have been completed. The application may be made *ex parte* in circumstances where the giving of notice may seriously prejudice the police investigation for the purpose of which the application is sought.

82. The precise mechanism which might be put in place is ultimately a matter for the Oireachtas. It is not open to this court, under the guise of statutory interpretation, to graft such procedures onto the bare bones of section 10. As explained in the landmark judgment in *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317 (at 341), there are limits to the interpretative obligations of the court.

> "Therefore, an Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt. It must be added, of course, that interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas. In seeking to reach an

> interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning. At the same time, however, the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts."

83. In summary, therefore, the correct interpretation of section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 is that the application for a search warrant is to be made on an *ex parte* basis only. The District Court's function is confined principally to determining that there are "reasonable grounds" for suspecting that evidence of, or relating to, the commission of an arrestable offence (as defined) is to be found in the place in respect of which the warrant is sought. The District Court does not have jurisdiction, on a warrant-application, to determine any issue in respect of journalistic privilege.

WERE AN GARDA SÍOCHÁNA ENTITLED TO INVOKE SECTION 10?

84. The essence of the Applicants' case is that certain procedural protections should attend upon the issuance of a search warrant in respect of a journalist's property or premises. Specifically, it is said that, prior to the issuance of a search warrant, there should be a court-based adjudication upon whether an asserted claim of journalistic privilege is outweighed by some countervailing public interest. The approach initially adopted by the Applicants at the hearing before me in July 2020 had been to suggest that this outcome is to be achieved by reading the necessary procedural safeguards into section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. During the course of the hearing, however, there was a change in tack. Under the revised approach, it was accepted that

section 10 only allowed for an *ex parte* application. It was contended, instead, that it was impermissible for An Garda Síochána to rely on section 10 at all in circumstances where a *prima facie* claim of journalistic privilege has been made. On the facts of the present case, Mr Corcoran had expressly asserted privilege over the contents of his mobile telephone at the cautioned interview on 18 December 2018.

85. The position of the Applicants, as refined at the hearing, is that it is the *action* of An Garda Síochána in applying for a search warrant that is unlawful. The argument here is that—given that the search warrant procedure does not allow for the possibility of the consideration of a claim of journalistic privilege—it is impermissible for An Garda Síochána to invoke the procedure in any case where there is a *prima facie* claim of journalistic privilege. An Garda Síochána are required, instead, to institute proceedings before the High Court. An order can be sought, pursuant to Order 50, rule 4 of the Rules of the Superior Courts, seeking the detention, preservation, or inspection of any property or thing. The High Court would then carry out the requisite balancing exercise in the context of those proceedings.

86. The Applicants argue that the failure on the part of An Garda Síochána to have pursued High Court proceedings from the outset has the consequence that they are now precluded from relying upon the fruits of the search warrant. It is not enough, on this argument, that the matter has come before the High Court in the within proceedings taken by the Applicants. The High Court should simply rule that the search and seizure is unlawful, and direct the return of the mobile telephone.

87. By contrast, the submissions on behalf of An Garda Síochána envisage a very different role for the High Court. It is submitted that the High Court should now carry out the balancing exercise in the context of these judicial review proceedings.

88. The respective positions adopted by the parties each present potentially difficult legal issues. The Applicants appear to argue that an *intra vires* exercise of a statutory power may nevertheless involve unconstitutional action. An Garda Síochána's argument, i.e. that the availability of judicial review fulfils the obligation, if any, to carry out a balancing exercise; relies heavily on the happenstance that the content of the mobile telephone had not been immediately accessible. The Applicants had, commendably, been in a position to institute these proceedings within a matter of hours, and prior to the police authorities being able to access the password-protected content of the mobile telephone. In other cases, such a window of opportunity will not exist. For example, if the material over which journalistic privilege is asserted takes the form of a written document or is on a device which is not password-protected, then same may already have been accessed before even the most swift-footed litigant is able to bring the matter before the High Court.

89. These are difficult issues, and a determination of same might have implications well beyond this case. It must be doubtful whether it would be appropriate to resolve these issues in proceedings to which the Attorney General is not a party. Had the proceedings entailed a challenge to the validity of section 10, it would have been necessary to join the Attorney under Order 60 and/or Order 60A of the Rules of the Superior Courts.

90. As it happens, however, it is possible to resolve the dispute between the parties on a narrower basis. The Applicants' case is predicated on an *assumption* that, in the circumstances outlined in Mr Corcoran's affidavits, they are entitled to rely on journalistic privilege to resist disclosing the content of the mobile telephone. The Applicants' criticisms of the procedures adopted by An Garda Síochána all flow from that assumption. For the reasons which follow, I have concluded that that assumption is

not well founded, and that there is no right to rely on a claim of journalistic privilege in this case.

91. There is, undoubtedly, a public interest in the protection of journalistic sources. As explained by the Supreme Court in *Mahon v. Keena*, a journalist will not be ordered to disclose his or her sources unless such disclosure is justified by an overriding requirement in the public interest. The need for any restriction on freedom of expression must be convincingly established.

92. The height of the Applicants' case is that the identity of the individual who had been the source of the "tip off", which led to Mr Corcoran attending at the aftermath of a criminal incident, should be protected. Perhaps tellingly, Mr Corcoran has provided no information whatsoever as to the circumstances in which this individual approached him. In particular, there has been no attempt to explain what the motivation of the source may have been or what public interest he or she sought to advance by the publication of the criminal incident.

93. In carrying out the requisite balancing exercise, the following factors must be weighed against the asserted public interest in protecting journalistic sources. First and foremost, there is a countervailing public interest in the investigation and prosecution of criminal offences. As explained in their affidavits, An Garda Síochána seek to conduct a very limited examination of the content of the mobile telephone in support of their investigation of alleged offences of the most serious kind. The examination would be confined to activity on the mobile telephone over a specified period of time shortly before and immediately after the events of 16 December 2018.

94. The mere fact that the disclosure of journalistic sources is sought in the context of a criminal investigation will not necessarily be determinative. In this regard, it is respectfully suggested that the *obiter dicta* of Walsh J. in *Re O'Kelly* may put the matter

too far when they suggest that journalists are not any more constitutionally or legally immune than other citizens from disclosing information received in confidence. The subsequent case law confirms that journalists do, indeed, enjoy a right to protect their sources. Crucially, however, this right is not absolute or inviolable.

95. The disclosure of journalistic sources might well be disproportionate in the case of minor offences. This would be especially so where the alleged criminality relied upon is directly connected to the publication complained of. More specifically, an allegation that the provision of information to a journalist had involved the "theft" of confidential information would not, generally, be sufficient to defeat a claim of journalistic privilege. Were it otherwise, it would be all too easy to suppress the publication of material by conjuring up an alleged criminal offence.

96. The facts of the present case are, however, entirely different. Here, the criminal conduct alleged consists of the carrying out of "arrestable offences" as defined. These are said to arise out of a serious assault and the destruction of property. The criminal conduct is extraneous to, and separate from, the disclosure or publication. I am satisfied that the public interest in ensuring that all relevant evidence is available in the pending criminal proceedings overrides the claim for journalistic privilege in this case.

97. Secondly, there is a related public interest in the proper investigation of criminal offences. This enures not only for the benefit of the public at large, but also for the benefit of those accused of criminal offences. An Garda Siochana are under an obligation to seek out and preserve evidence. It is important to note that, in some instances, the evidence will be *exculpatory* of individuals against whom charges have been preferred. On the facts of the present case, it is necessary for An Garda Síochána to ensure that the entirety of the video footage and digital photographs taken by Mr Corcoran has been

obtained. The authenticity of the material also needs to be validated. Such material may be of assistance to the defence and not the prosecution.

98. Thirdly, the nature and extent of the examination of the mobile telephone proposed by An Garda Síochána is proportionate in that it is confined to a very short period of time. The detail of the proposed examination has been set out in the letter from An Garda Síochána summarised at paragraph 26 above.

99. Finally, the public interest in the publication of the events of 16 December 2018, and, in particular, the dramatic depiction of the destruction of the motor vehicles, must be considered. Without in any way questioning the *bona fides* of Mr Corcoran himself, the must be some doubt as to the motivation of his source in seeking to have the events publicised. The events, as described in the affidavits of An Garda Síochána, involved an attempt to reverse the effects of an eviction which had been carried out pursuant to a court order earlier that week. It might not be unreasonable to infer that the motivation of the source may have been to propagate the "message" that action would be taken against those, such as the security personnel allegedly assaulted, who seek to facilitate the repossession of property by financial institutions. There is case law from the ECtHR which indicates that the motivation of a source will be relevant in carrying out the requisite balancing exercise. More specifically, the ECtHR held in *Stichting Ostade Blade* (Application No. 8406/06) that not every individual who is used by a journalist for information is a "source". On the facts of that case, a magazine had published a statement from an organisation claiming responsibility for a bomb attack. The ECtHR held that an order to hand over the letter, which was followed by a search of the publisher's premises when it was not obeyed, constituted an interference with the publisher's right to "receive and impart information" as set out in Article 10. The interference was, however, justified under Article 10.2 in that it pursued the "legitimate aim" of "the prevention of ... crime".

The measure was necessary in that the material had been sought as providing a possible lead towards identifying a person or persons unknown who were suspected of having carried out a plurality of bomb attacks.

100. Relevantly, as part of its assessment the court considered the nature of the interference, and concluded that "source protection" was not in issue. See paragraph 65 of the judgment as follows.

> "In the present case the magazine's informant was not motivated by the desire to provide information which the public were entitled to know. On the contrary, the informant, identified in 2006 as T. (see paragraph 32 above), was claiming responsibility for crimes which he had himself committed; his purpose in seeking publicity through the magazine Ravage was to don the veil of anonymity with a view to evading his own criminal accountability. For this reason, the Court takes the view that he was not, in principle, entitled to the same protection as the 'sources' in cases like *Goodwin, Roemen and Schmit, Ernst and Others, Voskuil, Tillack, Financial Times, Sanoma,* and *Telegraaf*."

101. Counsel on behalf of An Garda Síochána cited the following passage from Reid, *A Practitioner's Guide to the European Convention on Human Rights* (fifth edition, Sweet & Maxwell, 2015) (at §54-022) which describes the consequence of the judgment as follows.

> "Information submitted to the press by the perpetrator of a criminal offence is not regarded as information from a journalistic source and not subject to any special protection. Thus, the search and seizure of materials at a magazine office in respect of identifying the person who had sent a letter claiming responsibility for a 'terrorist' attack on a chemical works did not disclose any problem under Article 10."

102. Applying the principles in *Stichting Ostade Blade* to the facts of the present case, in determining that the limited examination of the mobile telephone is justified by the public interest in the proper investigation and prosecution of criminal offences, I have had regard to the fact that the evidence does not establish that the journalist's source was motivated by the desire to provide information which the public were entitled to know.

EUROPEAN CONVENTION

103. In circumstances where the Applicants have not succeeded in obtaining relief by reference to their constitutional law arguments, it is necessary next to consider whether their claim is advanced by reference to the European Convention on Human Rights Act 2003 ("***the ECHR Act 2003***").

104. It is proposed to summarise the relevant principles under the European Convention before turning to consider the extent, if any, to which they are applicable to the case as pleaded by the Applicants.

105. Article 10 of the European Convention provides as follows.

> 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

106. Much of the case law of the ECtHR relied upon by the parties is directed to a consideration of whether the procedures provided for under the domestic law of the relevant Contracting State are sufficient. The Grand Chamber of the ECtHR summarised the procedural requirements as follows in *Sanoma Uitgevers B.V. v. The Netherlands* (Application No. 38224/03).

> "88. Given the vital importance to press freedom of the protection of journalistic sources and of information that could lead to their identification any interference with the right to protection of such

sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake.

89. The Court notes that orders to disclose sources potentially have a detrimental impact, not only on the source, whose identity may be revealed, but also on the newspaper or other publication against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who have an interest in receiving information imparted through anonymous sources (see, *mutatis mutandis*, *Voskuil v. the Netherlands*, cited above, § 71).

90. First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. The principle that in cases concerning protection of journalistic sources 'the full picture should be before the court' was highlighted in one of the earliest cases of this nature to be considered by the Convention bodies (*British Broadcasting Corporation*, quoted above (see paragraph 54 above)). The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not.

91. The Court is well aware that it may be impracticable for the prosecuting authorities to state elaborate reasons for urgent orders or requests. In such situations an independent review carried out at the very least prior to the access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises, and if so, whether in the particular circumstances of the case the public interest invoked by the investigating or prosecuting authorities outweighs the general public interest of source protection. It is clear, in the Court's view, that the exercise of any independent review that only takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality.

92. Given the preventive nature of such review the judge or other independent and impartial body must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed. The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established. It should be open to the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are

> specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalist's sources (see, for example, *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, cited above). In situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk (see, mutatis mutandis, *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, §§ 62-66, ECHR 2007-XI)."

107. There was much debate at the hearing before me in July 2020 as to whether the procedures prescribed for obtaining a search warrant under domestic law would meet the minimum safeguards identified by the ECtHR. The disagreement between the parties centred largely on whether the provisions of section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 should be considered in isolation, or whether, alternatively, they had to be considered in conjunction with the possibility of applying to the High Court for judicial review. On this alternative analysis, the absence of an *inter partes* hearing before the District Court is capable of being cured by judicial review proceedings before the High Court, wherein the requisite balancing exercise could be carried out. The correctness of this analysis turns on whether a meaningful distinction can be drawn between (i) the initial seizure of the mobile telephone, and (ii) the subsequent examination of its contents. On the facts of the present case, judicial review would be capable only of addressing the latter.

108. These arguments would have been of vital importance had the Applicants sought a declaration of incompatibility pursuant to section 5 of the ECHR Act 2003. In such a scenario, this court would be required to consider whether the relevant provisions of domestic law were compatible with the requirements of the European Convention. In truth, however, the Applicants' case is much narrower.

109. The European Convention is not directly applicable in domestic law. (See, for example, *J.McD. v. P.L.* [2009] IESC 81; [2010] 2 I.R. 199). It is, however, possible to rely on the European Convention indirectly pursuant to the ECHR Act 2003.

110. The Applicants had, initially, sought to rely on the interpretative obligation under section 2 of the ECHR 2003, as follows.

> 2.(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.

111. As appears, a court is required to interpret and apply a statutory provision in a manner compatible with the State's obligations under the European Convention provisions. It is now accepted, however, that even allowing for the interpretative obligation under section 2 of the ECHR Act 2003, section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 cannot be interpreted so as to allow for an *inter partes* hearing.

112. The Applicants instead seek to rely on section 3 of the ECHR Act 2003. Insofar as relevant, section 3 provides as follows.

> 3.(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.
>
> […]

113. It is pleaded at paragraph (e)(15) of the statement of grounds that An Garda Síochána is an organ of the State within the meaning of the ECHR Act 2003, and is obliged to perform

their functions in a manner compatible with the State's obligations under the European Convention. (It is also pleaded that the District Court is an organ of the State, but this plea is in error given that the definition under section 1 of an "organ of the State" expressly excludes a court). It is further pleaded, at paragraph (e)(18), that in applying for and acting on foot of the warrant, and in taking the mobile telephone, An Garda Síochána acted contrary to the provisions of Article 10 of the European Convention and did so knowingly, consciously and deliberately.

114. These pleas give rise, potentially, to difficult issues of law as to whether the making of an application for, and subsequent reliance upon, a search warrant which has been granted *intra vires* the relevant domestic legislation is capable of representing a breach of section 3 of the ECHR Act 2003. As appears, the obligation under section 3 is expressly qualified by the words "Subject to any statutory provision (other than this Act) or rule of law". It is at least arguable that section 3 is not intended to render unlawful what is otherwise an *intra vires* exercise of a statutory power.

115. An issue also arises as to the appropriate remedy for an alleged breach of section 3. The High Court (Irvine J.) held in *Pullen v. Dublin City Council* [2009] 2 I.L.R.M. 484 that the legislature did not intend to give a party who established a breach of statutory duty under section 3(1) a right to relief the effect of which would be to invalidate an order obtained on foot of a valid statutory provision and render that order unenforceable. Irvine J. (as she then was) concluded that it could never have been the intention of the legislature, having regard to the entire scheme of the ECHR Act 2003, to allow a plaintiff to achieve by, so to speak, the back door under section 3(2), a remedy which it could not have obtained following upon a declaration of incompatibility under section 5.

116. Strictly speaking, it is not necessary to resolve these difficult issues of law in order to determine the within proceedings. This is because, for similar reasons to those discussed

at paragraphs 90 to 102 above, I have concluded that the Applicants are not entitled to assert journalistic privilege under the European Convention in respect of the content of the mobile telephone. The same rationale applies to the right under the European Convention as to the constitutional right. In the absence of any breach of the European Convention, An Garda Síochána acted lawfully in invoking the procedure under section 10 of the Criminal (Miscellaneous Provisions) Act 1997 in the particular circumstances of this case.

ALLEGATION OF BIAS

117. The Applicants have pleaded that the application to issue a warrant should have been made to a judge other than Judge Faughnan. This plea is premised on the fact that one of the individuals against whom charges have been brought arising out of the events of 16 December 2018 has instituted judicial review proceeding seeking to preclude Judge Faughnan having any involvement in the prosecution.

118. Those proceedings are entitled *O'Toole v. Director of Public Prosecutions*, and bear the High Court record number 2019 No. 59 J.R. The pleadings in that case have not been put before the court, but it is explained in the written submissions that the allegation of objective bias centres on the existence of earlier civil proceedings between the judge and Mr O'Toole.

119. Insofar as relevant to the argument which the Applicants advance, the order granting leave to apply for judicial review in *O'Toole v. Director of Public Prosecutions* had imposed a stay in the following terms.

> IT IS ORDERED that any further proceedings as against the Applicant being heard or dealt with before the District Court in the person of Judge James Faughnan be stayed pending the determination of the within proceedings.

120. The terms of this order did not preclude the making of the application for a search warrant to Judge Faughnan. The search warrant is not directed to any property or premises belonging to Mr O'Toole. Moreover, there is no reference to Mr O'Toole in either information sworn in respect of the application for a search warrant. There is no suggestion whatsoever that there is any relationship between the District Court judge and the parties affected by the search warrant, i.e. the Applicants herein, which might give rise to objective bias.

121. In all the circumstances, this ground of challenge is not made out.

ADDRESS ON THE ARREST WARRANT

122. The Applicants have pleaded that An Garda Síochána were not entitled to either seek or rely on a single warrant to search multiple addresses which happened to be on the same street. The facts underlying this plea have been set out, in particular, at paragraphs 8 and 9 of Mr Corcoran's affidavit of 4 April 2019. It is alleged that members of An Garda Síochána had initially attended at the home of Mr Corcoran's grandparents at Bridge Street, Strokestown, Co Roscommon with a search warrant. There, they asked to speak with Mr Corcoran, and upon learning that he did not actually live there, the gardaí then went to his house on the same street.

123. Garda Sergeant Siggins, who executed the search warrant, has described the sequence of events on 4 April 2019 as follows. (See affidavit of 21 June 2019).

> "28. On the 4th April, 2019 at approximately 8.15 a.m. I made efforts to execute a Search Warrant at the home of Mr. Emmett Corcoran at Bridge Street, Strokestown, County Roscommon. It was my understanding that the First Applicant was staying at his grandparents' house and I went there. Also present was Sergeant Maura McGarry. There was no answer at that address.
>
> 29. At that point I was approached by a lady on the street who identified herself as Emmett Corcoran's sister. I Informed her that I wished to

speak to Emmet Corcoran and she stated that he had moved into the house next door.

30. She informed me that the First Applicant was sick at the moment as a result of having been diagnosed with illness and was awaiting an operation in hospital.

31. With the assistance of Sergeant Maura McGarry and Garda Vincent Hickey, I called to the new address of Emmett Corcoran at Bridge Street, Strokestown, County Roscommon. Mr. Corcoran answered the door and I requested to speak to him inside his home.

32. At that stage I informed Mr Corcoran that I had a Search Warrant in my possession to search his house for evidence in relation to the ongoing investigation at Falsk, Strokestown, County Roscommon on the 16 December, 2018. As part of the Search Warrant I informed him that I was entitled to search his property for mobile phones devices, computer and media devices as outlined in the Search Warrant. I also sympathised with Mr. Corcoran about his recent diagnosis."

124. This ground that the search warrant was defective had not been pressed at the hearing before me, and no case law was cited in support of the proposition. I am satisfied, having regard to the evidence of Garda Sergeant Siggins, that the execution of the search warrant had been lawful. The terms of the warrant authorised An Garda Síochána to enter and search the home of Emmet Corcoran on Bridge Street, Strokestown. The evidence indicates that only one premises had been entered into on 4 April 2019, and that it was, indeed, the home of Mr Corcoran.

CONCLUSION

125. The correct interpretation of section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 is that the application for a search warrant is to be made on an *ex parte* basis only. The District Court's function is confined principally to determining that there are "reasonable grounds" for suspecting that evidence of, or relating to, the commission of an arrestable offence (as defined) is to be found in the place in respect of

which the warrant is sought. The District Court does not have jurisdiction, on a warrant-application, to determine any issue in respect of journalistic privilege.

126. There is, undoubtedly, a public interest in the protection of journalistic sources. As explained by the Supreme Court in *Mahon v. Keena*, a journalist will not be ordered to disclose his or her sources unless such disclosure is justified by an overriding requirement in the public interest. The need for any restriction on freedom of expression must be convincingly established.

127. For the reasons set out in detail at paragraphs 90 to 102 above, the Applicants are not entitled to resist the very limited examination of the content of the journalist's mobile telephone sought by An Garda Síochána. In brief, the public interest in the protection of journalistic sources is outweighed by the countervailing public interest in ensuring that all relevant evidence is available in the pending criminal proceedings, and the related public interest in the proper investigation of criminal offences. The offences alleged are serious, involving the alleged assault of a number of individuals and criminal damage to property.

128. The evidence does not establish that the journalist's source was motivated by the desire to provide information which the public were entitled to know. It is not unreasonable to infer that the motivation of the source may have been to propagate the "message" that action would be taken against those, such as the security personnel allegedly assaulted, who seek to facilitate the repossession of property by financial institutions.

129. The examination of the content of the mobile telephone is to be limited to the following items.

    (i) The telephone calls to and from the phone for the period of the 11th – 17th December, 2018 inclusive;

(ii) The emails and text messages, including other social media messaging services such as Whatsapp, Facebook Messenger etc., sent from and received to the phone for the period of the 11th – 17th December, 2018 inclusive;

(iii) The images contained on the memory of the phone which were either captured, uploaded or placed onto the phone in the period of the 11th – 17th December, 2018 inclusive;

(iv) The videos which were recorded, uploaded or otherwise placed on the phone in the period of the 11th – 17th December, 2018 inclusive;

(v) Other information contained in the phone which was uploaded to it in the period of the 11th – 17th December, 2018 inclusive.

130. Finally, it should be reiterated that no challenge has been made in these proceedings to the validity of the statutory provisions governing the issuance of search warrants, i.e. section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. The Applicants have not sought a declaration to the effect that the provision is inconsistent with either the Irish Constitution or the European Convention. Nor have the Applicants sought a declaration that the Irish State has failed to prescribe a proper procedure for determining claims of journalistic privilege in the context of an application for a search warrant. This judgment does not, therefore, determine any of these issues.

FORM OF ORDER

131. The application for judicial review is dismissed. The order of the court will include a declaration to the effect that the examination of the content of the mobile telephone is to be limited to the items identified at paragraph 129 above.

132. The attention of the parties is drawn to the statement issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

133. The parties are requested to correspond with each other on the question of the precise form of order, and on the question of legal costs. In default of agreement between the parties on these issues, short written submissions should be filed in the Central Office. The first set of submissions should be filed by An Garda Síochána by 9 October 2020; the Applicants are then to file their replying submissions by 30 October 2020.

Appearances

Michael McDowell, SC and Morgan Shelley for the Applicants instructed by Carter Anhold & Co. Solicitors
Frank Callanan, SC and Tony McGillicuddy for An Garda Síochána instructed by the Chief State Solicitor