

**THE HIGH COURT
JUDICIAL REVIEW**

**[2022] IEHC 322
[Record No. 2020/867 JR]**

BETWEEN:

STEPHEN TALLON

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

IRELAND

AND

THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT by Ms. Justice Siobhán Phelan delivered on the 31st day of May, 2022

INTRODUCTION

1. This case concerns the constitutional interpretation and application of the anti-social behaviour order provisions of the the Criminal Justice Act, 2006 (“the 2006 Act”) and the constitutional soundness of certain of those provisions.

2. The Act gives members of An Garda Síochána (hereinafter the Gardaí) the power to issue a behaviour warning to a person who has behaved in an anti-social manner, as defined in the Act (s. 114(1)). The behaviour need not be criminal. If the person does not comply with

the warning, a senior member of the Gardaí may apply to the District Court for an order prohibiting the person from engaging in certain defined behaviour. Such an order may be granted on the civil standard of proof. A breach of the order constitutes a criminal offence.

3. These judicial review proceedings arise out of the Applicant's conviction on the 2nd of November, 2020 pursuant to s. 117 of the 2006 Act for his breach, on two separate occasions (August and October, 2020), of a civil order which the District Court imposed on him on the 31st of August, 2020 ('the civil order'), under s.115 of the 2006 Act. On the same day, the Applicant was also convicted of separate offences under sections 7 and 8 of the Criminal Justice (Public Order) Act, 1994 (hereinafter "the 1994 Act").

4. The pertinent part of the civil order reads that the District Court:

"HEREBY ORDERS pursuant to section 115 of the said Act of 2006 that the respondent be prohibited from engaging in public speaking and recording anywhere within the environs of Wexford Town including North Main Street Bullring, Selksker Square at any time."

5. The Applicant seeks *certiorari* in respect of the four conviction orders made by the District Court (Judge O'Shea) on the 2nd of November, 2020 as well as the civil order made on the 31st of August, 2020 (Judge Cheadle).

ISSUES

6. The Applicant advances his case by way of judicial review on the basis that the civil order, in its terms, exceeds the jurisdiction vested in the District Court under s. 115 because it prohibits acts or behaviour which are not themselves anti-social and interferes in an impermissible manner with the Applicant's constitutional rights, most particularly his right to freedom of expression, which is protected pursuant to the provisions of Article 40.6.1 of the Constitution.

7. In the alternative, the Applicant contends that if s. 115 of the 2006 Act properly construed, it gives jurisdiction to a District Judge to make a civil order prohibiting the exercise of a constitutional right in the manner which occurred in this case, then s. 115 is

unconstitutional on the grounds that it permits an impermissible interference with constitutional rights (specifically the right to freedom of expression and the right to equality insofar as it prohibits conduct which is not unlawful if carried out by a person who is not subject to a like order).

8. It is further contended that to the extent that the civil order was *intra vires* the powers of the District Judge under s. 115, then s. 117 of the 2006 Act is unconstitutional, in broad terms, because it:

(i) fails to vindicate a citizen's right not to be tried on a criminal charge save in due course of law (Article 38.1) by providing for an offence whose ingredients are impermissibly arbitrary and vague, related to past conduct, ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, prone to make a person's lawful occasions become criminal or based on an arbitrary discretion vested in the District Judge when making the civil order, non-compliance with which is an element of the offence;

(ii) fails to vindicate the right of all citizens to be held equal before the law (Article 40.1);

(iii) criminalizes an act without the requirement of it being established beyond reasonable doubt that the said person had deviated from a clearly prescribed standard of conduct (Article 38.1);

(iv) fails to vindicate the right not to be deprived of liberty and/or his personal rights on conviction when the ingredients of the offence are arbitrary and vague, related to past conduct, ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, based on an arbitrary discretion vested in the District Judge making the civil order, non-compliance with which is an element of the offence (Articles 40.4 and 40.3);

(v) fails to vindicate the right to freedom of expression (Article 40.6.1).

9. A challenge to the constitutionality of s.s 7 and 8 of the 1994 Act was expressly abandoned during the hearing but the Applicant maintains his claim for *certiorari* of the conviction orders obtained on foot thereof.

10. A number of procedural and preliminary objections have been identified in opposition to the proceedings including:

(i) The Applicant’s written submissions were due 12 weeks before the hearing date (in November, 2021) with the Respondents to have 6 weeks to respond. Regrettably, multiple letters from the Chief State Solicitors Office [hereinafter the “CSSO”] were ignored by the Applicant’s solicitors, and an application had to be made to Meenan J. As a result, the Applicant’s submissions were not delivered until shortly before the hearing – on the evening of Thursday, 10 February 2022, two working days before the case was due to start. This impacted on the Respondents’ ability to reply. The submissions filed made no reference to the authorities actually opened by the Applicant at the hearing and were not of much assistance in advancing the arguments;

(ii) The non-joinder of the Circuit Court as a Respondent and a failure to comply with the requirements of Order 84, Rule 2A;

(iii) A complaint of non-disclosure is made by reference to the failure to exhibit the transcript of the hearing in the District Court in August, 2020 thereby hiding the full extent of the evidence of anti-social behaviour;

11. These procedural issues were compounded by the presentation of incomplete papers to the Court including the wrong Statement of Grounds and grounding affidavit, all of which have added to the complexity and time the case has taken to resolve.

FACTUAL BACKGROUND

12. On the 31st of August, 2020, a civil order was made in respect of the Applicant pursuant to s. 115 of the Criminal Justice Act, 2006 in Wexford District Court. This Order was made following no less than five Adult Behaviour Warnings from members of AGS in Wexford town in June and July, 2020 as a result of his preaching and/or public speaking. Indeed, between the 18th of June, 2020 and in or about the 24th of August, 2020 there were approximately twenty-one recorded PULSE incidents (Garda computer records) connected with the Applicant’s behaviour. The Adult Behaviour Warnings referred variously to “*excessively loud preaching and commentary which caused interference and caused distress to people working in the vicinity of the Bull Ring and members of the public passing by*”, “*excessively loud preaching*

... causing persistent alarm, distress and intimidation to the public passing by”, “excessive loud and aggressive public speaking which caused annoyance and concern for the public and business owners in the vicinity”, “loud and continuous preaching of a very homophobic nature which was very upsetting for the members of the public, passers-by and business owners in the area.”

13. In making the civil order the District Judge had the benefit of evidence from no less than six garda witnesses and nine civilian witnesses. The Applicant appeared before the Court without legal representation. From the transcript of the hearing which was produced by the Second and Third Named Respondent in evidence, the evidence of anti-social behaviour relied upon was evidence to the effect that the Applicant engaged in preaching activity in a manner which was said to have impaired the use and enjoyment of people working in the vicinity of the Bull Ring.

14. From the evidence given in the District Court, the content of the Applicant’s preaching was varied, at times homophobic and using passages like Leviticus from the Bible and at times related to such varied issues as abortion, people wearing masks, obesity, the role of women (women working, women leaving their children, women drinking alcohol etc), racist speech and anti-religious speech. According to the evidence given to the District Judge in August, 2020, his preaching could be considered offensive and was liable to cause distress, anger and retaliatory behaviour including attacks on the Applicant’s person. One witness described his speech as being “*almost like a worm in my ear*”. The civil order made on foot of this evidence prohibited the Applicant from engaging in public speaking and recording anywhere within the environs of Wexford Town including an area known as “*the Bullring*” at any time.

15. On the 2nd of November, 2020, the Applicant appeared before the District Court on four separate charges, two charges for breach of the civil order contrary to s. 117 of the 2006 Act and separate charges pursuant to sections 7 and 8 of the 1994 Act.

16. The first s. 117 charge related to day the civil order was made. The evidence was that the Applicant left Court on the 31st August, 2020 and returned to the Bull Ring where he engaged in public speaking and was heard to say “*that no court in the land could stop him from his right as an Irish man*”. The Applicant was brought back before Wexford District Court and charged under s.117(1)(b) of the Act for breaching the Order made earlier on that day without

reasonable excuse. The Charge Sheet refers to him having “... engage[d] in public speaking with a loudspeaker” at “The Bull Ring, North Main Street, Wexford”. The Charge Sheet records that on being arrested for a breach of the civil order he replied, among other things: “It is fallacious and not rooted in law”.

17. The separate charges pursuant to ss. 7 and 8 of the 1994 Act related to events on the 19th September, 2020. On that occasion the Applicant again attended at the Bullring but this time with a sign. He was again arrested. On this occasion he was charged under ss.7 and 8 of the 1994 Act for displaying “a sign which was threatening, abusive, insulting or obscene with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace might have been occasioned”.

18. When the matter came before the Court on the 2nd of November, 2020, the Court was told that the sign contained extracts from scripture and was obscene and insulting. The Court was further told that the Applicant did not speak on that occasion and no complaint was made by a member of the public. The sign displayed messages such as: “Same sex sin deserves Satan”, “Homosexuality is unnatural”, “Homosexuals will burn in hellfire unless they repent”. The Garda evidence was to the effect that when the Applicant was directed to desist and move on, he became argumentative and did not comply with the direction.

19. Finally, on the 7th October, 2020, the Applicant was arrested, again at the Bullring, in respect of his use of a loudspeaker. He was charged once again under s.117(1)(b) of Act for non-compliance with the civil order. On this occasion the evidence offered to the District Court was that he was singing. The arresting guard said: “I interpreted that Mr. Tallon was engaging in public speaking. He was referencing Jesus.” The Guard went on in his evidence to say that he couldn’t make out what he was saying, he just heard “Jesus” over and over again. The Guard confirmed in his evidence that the singing was not anti-social and the Applicant was not abusive

20. On 2nd of November 2020, the Applicant was tried in Wexford District Court and convicted of all charges. He was sentenced to a total of eight months imprisonment: two consecutive four month sentences for each of his convictions under s.117(1)(b) of the Act, with the offences under ss.7 and 8 of the 1994 Act taken into consideration. The Applicant has filed

an appeal in the Circuit Court which appeal has been stayed pending the outcome of this judicial review.

21. As established in the Respondents' evidence there had been complaints from members of the public in Wexford about the Applicant and his behaviour, leading to the civil order. The transcript of the application for the civil order of the 31st of August 2020 is exhibited to the affidavit of Garda Murray. It is suggested by the Respondents that it provides vital context against which the Applicant's claims of vagueness might be gauged. It is contended that it, and the transcript of the subsequent criminal proceedings, leave little room for doubt but that the Applicant was fully conversant with the purpose, scope and effect of the civil order and that his subsequent actions were wholly directed towards avoiding same.

STATUTORY FRAMEWORK

22. Part 11 of the 2006 Act is entitled "*Civil Proceedings in Relation to Anti-Social Behaviour*". It provides at s. 113 for the interpretation and application of the anti-social behaviour provisions in the following terms:

113.— (1) In this Part—

“behaviour warning ” has the meaning assigned to it under section 114 ;

“civil order ” means an order described in section 115 (1) ;

“senior member of the Garda Síochána” means a member of the Garda Síochána not below the rank of a superintendent.

(2) For the purposes of this Part, a person behaves in an anti-social manner if the person causes or, in the circumstances, is likely to cause, to one or more persons who are not of the same household as the person—

(a) harassment,

(b) significant or persistent alarm, distress, fear or intimidation, or

(c) significant or persistent impairment of their use or enjoyment of their property

(3) This Part does not apply—

(a) in respect of behaviour of a person who is under the age of 18 years at the time the behaviour takes place,

(b) to any behaviour of a person that takes place before this section comes into force, or

(c) to any act or omission of a person in respect of which criminal proceedings have been instituted against that person.”

23. Section 114 provides for the issue of behaviour warnings by a member of An Garda Síochána to a person who has behaved in an anti-social manner (s. 114(1)). It is provided that the behaviour warning may be issued orally or in writing and, if it is issued orally, it shall be recorded in writing as soon as reasonably practicable and a written record of the behaviour warning shall be served on the person personally or by post (s. 114(2)). The behaviour warning or, if it is given orally, the written record must (a) include a statement that the person has behaved in an anti-social manner and indicate what that behaviour is and when and where it took place, and (b) demand that the person cease the behaviour or otherwise address the behaviour in the manner specified in the warning, and (c) include notice that—(i) failure to comply with a demand under *para. (b)*, or (ii) issuance of a subsequent behaviour warning, may result in an application being made for a civil order. There is a temporal limit under s. 114(5) which provides that a behaviour warning may not be issued more than one month after the time that—(a) the behaviour took place, or (b) in the case of persistent behaviour, the most recent known instance of that behaviour took place. Further, s. 114(6) provides that behaviour warning remains in force against the person to whom it is issued for 3 months from the date that it is issued except where an application is made on foot of same to the District Court in which case it remains in force until the application is determined by the District Court.

24. The power of the District Court to make a civil order is provided for under s. 115 of the 2006 Act in the following terms:

“115. – (1) On application made in accordance with this section, the District Court may make an order (a “civil order”) prohibiting the respondent from doing anything specified in the order if the court is satisfied that—

(a) the respondent has behaved in an anti-social manner,

(b) the order is necessary to prevent the respondent from continuing to behave in that manner, and

(c) having regard to the effect or likely effect of that behaviour on other persons, the order is reasonable and proportionate in the circumstances.

(2) The court may impose terms or conditions in the civil order that the court considers appropriate.

(3) An application for a civil order may only be made by a senior member of the Garda Síochána and shall be made—

(a) on notice to the respondent, and

(b) in the district court district in which the respondent resides at the time.

(4) Before making the application, the senior member of the Garda Síochána must be satisfied that either or both of the following conditions have been met:

(a) the respondent has been issued a behaviour warning and has not complied with one or more of the demands of that warning;

(b) the respondent has been issued 3 or more behaviour warnings in less than 6 consecutive months.

(5) The respondent in an application under subsection (1) may not at any time be charged with, prosecuted or punished for an offence if the act or omission that constitutes the offence is the same behaviour that is the subject of the application and is to be determined by the court under subsection (1) (a) .

(6) Unless discharged under subsection (7), a civil order remains in force for no more than the lesser of the following:

(a) two years from the date the order is made;

(b) the period specified in the order.

(7) *The court may vary or discharge a civil order on the application of the person subject to that order or a senior member of the Garda Síochána.*

(8) *An applicant under subsection (7) shall give notice of the application—*

(a) if the applicant is the person subject to the civil order, to a senior member of the Garda Síochána in the Garda Síochána district in which the applicant resides, or

(b) if the applicant is a senior member of the Garda Síochána, to the person who is the subject of the civil order.

(9) *The standard of proof in proceedings under this section that applicable to civil proceedings.*

(10) *The jurisdiction conferred on the District Court by this section be exercised as follows:*

(a) in respect of subsections (1) and (2) , by a judge of the District Court for the time being assigned to the district court district in which the respondent resides at the time the application is made;

(b) in respect of subsection (7), by a judge of the District Court for the time being assigned to the district court district in which the person subject to the civil order resides at the time the application is made.”

25. Great emphasis was placed on the part of the State Respondents during the hearing on the breadth of the jurisdiction vested in the District Court under s. 115 by reason of the words which permit the Court to make “*an order prohibiting the respondent from doing anything specified*”. Reliance was also placed on the provision for an application to vary which has not been utilised in this case despite criticisms of the order made and provision for an appeal against the making of the order under s. 116 (a full *de novo* hearing before the Circuit Court), which was also not used in this case.

26. For his part, counsel for the Applicant placed reliance, in contending for a constitutional construction of s. 115, on the requirement for the District Judge to be satisfied not only as to

the anti-social behaviour of the Respondent but also that the order made is necessary to prevent the Respondent from continuing to behave in that manner, and having regard to the effect or likely effect of that behaviour on other persons, the order is reasonable and proportionate in the circumstances. It is contended that this provision is directed to ensuring that any civil order made is tailored to ensure that where there is an interference with the Respondent's rights, the interference is as limited as the exigencies allow. The Applicant argues that the civil order made in this case was made in breach of the requirement for proportionality which are in built into the statutory scheme, properly construed.

27. Section 117 of the Act criminalizes a breach of a civil order in the following terms:

“117.— (1) A person commits an offence who—

(a)

(b) without reasonable excuse, does not comply with a civil order to which the person is subject.

(2) A member of the Garda Síochána may arrest a person without warrant if the member has reasonable grounds to believe that the person has committed an offence under subsection (1) (b).

(3) A person who commits an offence under subsection (1) is liable, on summary conviction, to the following:

(a) for an offence under subsection (1) (a), a fine not exceeding €500;

(b) for an offence under subsection (1) (b), a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both.”

28. It is contended that ss. 115 and 117 operating together have the effect of criminalising behaviour which is not otherwise criminal and on the basis of a civil standard of proof in circumstances where to establish an offence under s.117, all that is required is a breach of a civil order which may not itself be directed to criminal activity. Provision is made for the grant of legal aid in respect of an application under Part 11 of the Act (s. 118).

SUBMISSIONS OF THE PARTIES

29. I do not propose to rehearse all of the parties' submissions in this judgment but propose to broadly summarize the main thrust of the arguments made.

30. The Applicant's counsel addressed the complaint of non-disclosure in the first instance. It was accepted on behalf of the Applicant that had the application been presented in a manner which gave the impression that there had been no complaints made about the Applicant and his preaching, then this would have been a material non-disclosure. The Applicant's firm position, however, is that this impression was never given nor sought to be given.

31. It was accepted on behalf of the Applicant that no detail was given in the grounding application of the District Court hearing that led to the making of the District Court Order but this was because no complaint is made in these proceedings with regard to the manner in which the case was conducted before the District Court. Furthermore, it was not objected that the District Court could properly come to the conclusion that the Applicant had behaved in an anti-social manner in the way he was preaching.

32. The primary concern on behalf of the Applicant relates to the actual order made which the Applicant contends cannot be considered "*necessary*" because it extends well beyond what is required to ensure no continuation of anti-social behaviour in that the civil order made prohibits any form of public speaking. It was argued that the civil order made is not sufficiently certain as to enable the Applicant to know precisely what it is he is prohibited from doing on risk of being subject to a criminal charge. It was submitted that the prosecution for failure to comply with the civil order for singing a hymn demonstrates this lack of certainty as singing was not identified in the Order. Further, there being no suggestion there is anything unacceptable in singing a song about Jesus Christ, the civil order is being interpreted in a manner which criminalizes expression which is not otherwise determined to have been anti-social notwithstanding the Applicant's constitutionally protected rights which are engaged in a restriction of public speaking or singing and which require equality of treatment before the law.

33. It was maintained on behalf of the Applicant that insofar as a civil order made pursuant to s. 115 prohibits anti-social behaviour, this must be read as behaviour of the same kind which has been found to be anti-social and cannot properly extend to acts which an individual has a right under the Constitution to engage in and which are not in themselves the subject of a finding that they constitute anti-social behaviour. The mischief which is sought to be addressed

by the making of a civil order is the mischief of the anti-social behaviour in question as found by the Court. Where anti-social behaviour pertains to speech or speech about religion (as at least sometimes in the Applicant's case) then the offensive behaviour is tied with the exercise of a constitutional right. While the exercise of the constitutional right is not absolute and may be limited having regard to the interests of public peace and order, any interference by order should, in accordance with the doctrine of proportionality, be limited to the extent necessary to ensure that the anti-social behaviour does not continue. It was accepted that the civil order made was geographically limited to the county where the Applicant lives but submitted that it was otherwise an absolute prohibition on any form of public speaking, albeit that it did not extend to social media or written communication.

34. It was submitted that properly construed, s. 115 of 2006 Act does not provide for the making of an order that a person be prohibited absolutely from public speech regardless of whether or not the speech was anti-social. Were the section to be interpreted broadly as providing for such a far-reaching interference with rights, then it is the Applicant's case that it is not compatible with the Constitution.

35. It is submitted on behalf of the Applicant with regard to s. 117 of the 2006 Act that insofar as the Order under s. 115 is considered to be *intra vires*, then it creates an offence which is impermissibly arbitrary and vague. Particular reliance was placed on behalf of the Applicant in this regard on the fact that the Applicant was charged with an offence of breach of an order precluding "*public speaking*" whilst engaged in singing which in itself was un-offensive. Furthermore, it is said, the offence for which he is convicted relates to past conduct insofar as the civil order which is breached is made having regard to past anti-social behaviour but the conviction is entered regardless of whether the behaviour which constitutes a breach of the civil order is itself anti-social behaviour. Accordingly, the conviction is not for a recurrence of anti-social behaviour, so found.

36. The Applicant further contended that conviction on foot of the civil order as construed by the Prosecuting Guard and the District Court results in a breach of the Applicant's equality rights as the conduct which results in a conviction e.g. singing a hymn in public, would not result in a criminal sanction if carried out by anyone else. In oral submission, the Applicant referred the Court to *TN v. DPP* [2020] IESC 26; *Bitá v. DPP & Ors* [2020] IECA 69 and *Murphy v. IRTC* [1999] 1 IR 12. In reply, the Applicant referred the Court to *DK v. Crowley*

& *Ireland* [2002] 2 IR 744. It was a point of contention raised on behalf of the Respondents that none of these cases were addressed in the written submissions filed on behalf of the Applicant. In written submissions, reliance was confined to *AG v. Cunningham* [1932] 2 IR 28; *King v. AG* [1981] IR 233; *Dokie v. DPP* [2011] IEHC 110, *Douglas v. DPP* [2017] IEHC 248 and *Terminiello v. Chicago* 441 US Supreme Court.

37. Counsel for the First Named Respondent confirmed in his submissions that the Director is not concerned with the civil order made as this is not a prosecution matter, notwithstanding the involvement of garda witnesses in applying for and giving evidence for the purpose of securing that order. Accordingly, the First Named Respondent was a stranger to the application for a civil order. Counsel for the First Named Respondent also pointed out that while there had been a challenge to the conviction orders made pursuant to ss. 7 and 8 of the Criminal Justice (Public Order) Act, 1994 (as amended), very little had been said in argument on behalf of the Applicant as to why those convictions were liable to be quashed in judicial review proceedings. The First Named Respondent's position in this regard was that the District Court Judge had made a determination within jurisdiction and supported on the evidence in convicting the applicant and that no claim was advanced that the trial was in any way unfair. As for the s. 117 offences, the position of the First Named Respondent was that constitutional grounds were for the Second and Third Named Respondents and the First Named Respondent proposed only to address "*non-constitutional*" grounds.

38. Counsel for the First Named Respondent contended that the proceedings were improperly constituted. It was argued in reliance on *Brady v. Revenue Commissioners & Ors.* [2021] IECA 8 that there had been non-compliance with Order 84 Rule 2A occasioned by the failure to join the Court Judge by naming the institution generically. It was acknowledged, however, that the decision in *Brady* to dismiss the application was arrived at not alone by reference to the procedural irregularity but also following a consideration of the substance of the case on the merits of the case made. It was argued that as a matter of first principles one could not properly pursue relief by way of certiorari without the Court whose order was challenged being a party to the proceedings.

39. Insofar as non-constitutional grounds were being pursued, the First Respondent urged me to refuse to entertain the application for *certiorari* on the basis that the appropriate remedy was one of appeal. I was referred to the First Named Respondent's written submissions where

reliance was placed on cases such as *E.R. v. DPP* [2019] IESC 86 (Charleton J.); *State (Daly) v. Ruane* [1988] ILRM 177 (O’Hanlon J.); *Sweeney v. District Judge Fahy* [2014] IESC 50 (Clarke C.J. as he then was); *Farrelly v. Devally* [1998] 4 I.R. 76 (Morris J.); *Lennon v. District Judge Clifford* [1992] 1 I.R. 382 (O’ Hanlon J.) and; *Doyle v. Judge Connellan & DPP* [2010] IEHC 287 (Kearns P.) to the general effect that the role of the Court in judicial review does not extend to an analysis of the evidence and the Court in judicial review does not act as a Court of Appeal and should not intervene in relation to matters such as the assessment of the evidence called at trial where the appropriate remedy was one of a *de novo* hearing on appeal. The First Respondent contended that the non-constitutional grounds urged on behalf of the applicant amounted to an invitation to the Court on behalf of the applicant to enter upon an analysis of the trial, which it was submitted was not the function of the Court in judicial review proceedings. It was argued that the absence of evidence or the weight attached to evidence is for the District Court judge.

40. Counsel for the Second and Third Named Respondents raised a number of preliminary objections. In the first instance, he was very critical of the manner in which the constitutional challenge in these proceedings was presented to the Court. It was observed that a degree of solemnity is required where such proceedings are concerned. The failure on the part of the Applicant to meet Court imposed deadlines in relation to the exchange of written submissions which were directed to the orderly hearing of the case was lamented as unforgiveable in circumstances where the Court had directed the filing of submissions 12 weeks in advance but they were in fact delivered only days in advance of the hearing date. It was further observed that the written submissions such as they were had been “*cobbled together*” and furthermore did not include any reference to the primary authorities relied upon on behalf of the Applicant during the hearing. It was described as frustrating that no Irish authority in relation to freedom of expression was cited in the written submissions and “*inconceivable*” that the decision in *Murphy v. IRTC* was not addressed in the written submissions. It was pointed out that issues raised by the Respondents, some of them procedural issues, were simply ignored.

41. In opposing an entitlement to relief in these proceedings, the Second and Third Named Respondents also laid emphasis on a want of full and proper disclosure on the part of the Applicant. It was contended that the Applicant had sought to airbrush out the entirety of the

civil process before the District Court in obtaining the s. 115 civil order by their failure to make reference to the evidence which had been led for the purpose of securing the civil order. It was pointed out that the entirety of the case was really about the civil order as the criminal prosecution is simply the enforcement mechanism and that therefore the Court should have been provided with information in relation to the basis which was advanced for securing the civil order in the first instance. Counsel queried rhetorically whether it was tolerable that a Court would be asked to deal with a constitutional action when basic facts had not been put before the Court.

42. Importance was attached on behalf of the Respondents to the facts in this case in circumstances where it was said that “*no sooner was the ink dry*” on the civil order than the Applicant returned to the Bull Ring and engaged in public speaking notwithstanding the evidence just heard in the District Court in relation to the adverse impact of his public speaking on members of the public. It was contended that the Applicant’s behaviour displayed that he had not the slightest intention of complying with the civil order.

43. I was invited to dismiss the proceedings *in limine* having regard to the failure to put before the Court in these proceedings the facts in relation to the evidence led. It was further complained that it is unclear what case is actually being made on behalf of the Applicant having regard to the manner in which the case is pleaded. It was submitted that while the proceedings undoubtedly raise potentially interesting issues, it is simply not an appropriate case to deal with these matters.

44. In terms of the substance of the proceedings, the Court was next invited by Counsel for the Respondents to consider the terms of the civil order in relation to the mischief it was designed to prevent in view of the evidence led in the District Court for the purpose of securing the Order. The thrust of the argument made was that the evidence demonstrated that an order in the terms of that drawn was necessary and proportionate to the mischief as described in the evidence of the anti-social behaviour which was led before the District Court and resulted in the making of the civil order. In this regard emphasis was placed not just on the content of the Applicant’s speech as described in evidence but also on the manner of his speech. Thus, I was asked to consider the transcript of the 31st of August, 2020 hearing, including specifically, the

evidence of Garda Keating (p. 11, line 15, Ms. Glover (p. 12 lines 26, 29) and Ms. Donnelly (p. 15).

45. As for the evidence led in November, 2020 counsel for the Second and Third Named Respondents submitted that it is irrelevant whether that evidence described anti-social behaviour in circumstances where the evidence led on that occasion was directed to it being in breach of the civil order. The criminal act is not the repetition or recurrence of wrongdoing which was found to constitute anti-social behaviour but rather the breach of the civil order. The civil order itself was directed in terms not of the specific anti-social behaviour which was to be prevented (offensive, loud and aggressive speech of the diverse kinds described in evidence during the course of the hearing in August, 2020) but rather the measure needed to prevent recurrence of that behaviour, namely an order prohibiting public speaking. It is non-compliance with the terms of this order which constitutes an offence, not necessarily the recurrence of anti-social behaviour. It was submitted that this is a well understood mechanism or device. My attention was also drawn to the prescribed procedural safeguards including the requirements as to warning(s), the availability of legal aid, the possibility of an application to vary and the right of appeal, all of which form part of the statutory framework which together provide for a constitutionally sound process.

46. Counsel likened the power created under s.115 to a generous statutory injunction jurisdiction in circumstances where, viewed in the broader legal context, the District Court does not have an equitable jurisdiction. It was submitted that the effect of ss. 115 and 117 was to vest the District Court with a statutory jurisdiction to injunct behaviour and render the breach of the injunction order a criminal offence. It was submitted that the exercise of injunctive powers may impinge on constitutional rights and that on the logic of the Applicant's argument a jurisdiction to injunct what is otherwise lawful behaviour would be unconstitutional in and of itself. Following through on the logic of this argument I was invited to conclude that this could not be correct as otherwise an injunction of the High Court which restrained the exercise of a constitutional right would be unconstitutional.

47. In further support of his argument, counsel referred me to s. 10 of the Non-Fatal Offences Against the Person Act, 1997 which deals with harassment and provides for the making of an order prohibiting communication, the breach of which constitutes a criminal offence. It was further submitted that the case advanced on behalf of the Applicant was radical

and would encompass an offence of breach of a barring order under the Domestic Violence Act, 1996 or an offence of failing to comply with notification requirements under the Sex Offenders Act, 2001. It was submitted that the Court in making orders under these established jurisdictions was performing the same kind of exercise as the District Court in this case but the core of the argument is wholly without any foundation.

48. As for the Applicant's constitutionally safeguarded right to freedom of expression, counsel for the Second and Third Named Respondent argued that this right is not an unlimited or absolute right. It was contended that to the extent that the civil order interferes with the Applicant's right to communicate and express himself, this was a legitimate constraint which was akin to an injunctive power vested in the District Court. In deciding whether to exercise that statutory jurisdiction, capable of interfering with rights, the District Court is engaged in balancing competing sets of interests. Counsel relied on *Murphy v. IRTC* to contend that the Order in this instance was constitutionally acceptable because it was directed to a limited area being confined to Wexford and to public speaking but to no other forms of communication. It was submitted that it remained open to the Applicant to avail of a broader range of communication channels such as social media or correspondence. As such it was contended that the restraining of public speaking was a minimalist interference. It was also contended that this minimal restraint should be considered in the context of the facility to apply for a variation.

49. Addressing the argument that Part 11 is void for uncertainty or by reason of the vagueness of the offence there created, Counsel for the Second and Third Named Respondent relied on the fact that the provisions do not create a general criminal offence. It is submitted that the offence is the failure to comply with the civil order and the civil order is specific in its scope and neither vague nor uncertain. Counsel for the Second and Third Named Respondents contended that neither *TN* nor *Bita* assist the Applicant's argument because the Part 11 regime avoids all uncertainty by specifying the offending behaviour in advance in the terms of the civil order and it is the non-adherence to the terms of order which gives rise to a criminal culpability.

DISCUSSION AND DECISION

Complaint of Non-Disclosure, Evidential Deficit and Failure to Comply with Court Timelines

50. The Respondents' complaint that the Applicant failed to make full disclosure in moving his application is based on the failure to exhibit the transcript of the District Court proceedings or describe the evidence led against the Applicant during the civil hearing in August, 2020. It is said that this failure might give the impression that there had been no complaints made about the Applicant and his preaching. In the event, of course, the Respondents obtained the transcripts from both hearings in the District Court in August and November, 2020 and these were exhibited in the replying affidavits filed in the proceedings.

51. While the Respondents are entitled to argue before this Court that there are aspects of the Applicant's conduct which would warrant the exercise by me of a discretion not to grant relief in judicial review proceedings, in my view the emphasis placed on a non-disclosure argument in this case was misplaced. As the Respondents must be aware, it is not unusual for the transcript not to be available at the leave stage in view of time and resource issues. Indeed, it is clear from the transcript of the second hearing in November, 2020 that the Applicant did not have available to him the transcript from the first hearing in August, 2020. The Applicant was not legally represented during the hearing in August, 2020 and it appears that his legal advisers relied during the second hearing on a newspaper report of the first hearing.

52. Furthermore, in circumstances where it was a condition precedent to the making of a civil order under s. 115 of the 2006 Act that the application be preceded by at least one adult behaviour warning that has not been complied with or a series of 3 or more in less than a 6 month consecutive period (s. 115(4) (a) and (b)) and where the Applicant does not contend in these proceedings that this condition precedent was not complied with, I see little merit to the suggestion that the Court was somehow misled at the leave stage into believing that there had been no complaints about the Applicant and his preaching. The fact that the civil order was made was clearly before the Court and no case was made that there had been non-compliance with this condition precedent. The fact of the making of the civil order therefore presupposes, without the case being made to the contrary, that at the very least there had been an adult behaviour warning before recourse was had to the court for a civil order.

53. I agree that the position might be otherwise were the Applicant to contend that there was no evidential justification or basis for the making of a finding of anti-social behaviour in respect of the Applicant without outlining to the Court the nature of the evidence actually available, but this is not the Applicant's case in these proceedings. On the contrary, the

Applicant expressly takes no issue with the Court’s conclusion that he had behaved during the summer of 2020 in an anti-social manner within the meaning of the 2006 Act. The Applicant’s argument in these proceedings is not that this finding of anti-social behaviour made by the District Judge was flawed or made without evidence or in the face of the evidence but rather that the civil order which followed is unlawful.

54. In contending that the Applicant has been guilty of non-disclosure in the presentation of its application for leave to proceed by way of judicial review consequent upon the failure to exhibit the transcripts of outline the evidence which led to the making of the civil order, the Respondents rely on extracts from Collins and O’Reilly, *Civil Proceedings and the State* (2nd ed., 2004) where the authors note (para. 5-56):

“A failure to put all relevant material before the court upon making an application for leave may justify the leave order being set aside. A fortiori, a lack of candour or a suppression of material facts in the evidence presented before the court will grant a refusal to grant relief.”

55. They also refer to the decision of Kelly J. (as he then was) in *Adams v. DPP* [2001] 2 ILRM 401 at p. 416 where he states:

“On any application made ex parte the utmost good faith must be observed, and the applicant is under a duty to make a full and fair disclosure of all of the relevant facts of which he knows, and where the supporting evidence contains material misstatements of fact or the applicant has failed to make sufficient or candid disclosure, the ex parte order may be set aside on this very ground”.

56. Of note, in both extracts cited before me a remedy for material non-disclosure or misstatement at the leave stage identified is an application to set-aside the leave granted. While the parties before me adopt opposing positions as to the relevance of the evidence before the District Court, it is telling that no application to set aside leave was made in this case. Instead, the Respondents proceeded to produce the evidence which they considered had been improperly omitted.

57. The Respondents further contend that the non-disclosure they identify is also material to the Court's consideration of the Applicant's argument that the civil order is vitiated by vagueness. It is submitted that the parameters of the civil order made should have been clear from the evidence led during the first hearing and that there was no doubt as to the type of behaviour the order was directed to. I am not at all persuaded that this submission is correct. Indeed, the evidence in this case is that the Garda Member who gave evidence on the prosecution for breach of the civil order repeatedly advised the Court that he "*interpreted*" the civil order as precluding singing in public. He was unable to say whether it precluded any singing or just singing about Jesus. It was no part of the previous evidence that singing was a feature of the anti-social behaviour complained of. Even if the evidence led had related to singing generally or singing about Jesus, however, it seems to me that a complaint of vagueness must be addressed by the terms of the civil order itself and does not derive its meaning from the evidence led to secure the order in the first place.

58. I fully agree with the Respondents' argument that constitutional challenges are not academic exercises and must take place against an evidential backdrop. It seems to me that it was proper and necessary that the transcripts of the evidence led in the District Court be available to the Court. I have carefully considered that evidence. The Respondents placed a lot of emphasis on the transcripts in their submissions in this case and even the Applicant's counsel relied upon them, albeit to a lesser extent and with a little prompting from me. The fact that the evidence was produced by the Respondents rather than the Applicant is not a feature of the case I attach much significance to in circumstances where it is possible that had the Respondents not exhibited the transcript, the Applicant would have done so by way of supplemental affidavit.

59. In terms of my ability to deal with the issues raised not as an academic exercise but against an evidential backdrop, I do not believe that an evidential deficit exists as regards the evidence led in the District Court on the application for a civil order or on the subsequent criminal prosecution for breach of that Order because the transcripts have been exhibited in full.

60. I do not find the complaint of material non-disclosure to have been substantiated and I do not consider that there has been a lack of candour in the presentation of relevant facts and

circumstances to the Court such as might justify me in refusing to deal with the application for judicial review on its merits.

61. The approach to this case on behalf of the Applicant insofar as the presentation of written submissions and documents in the case are concerned was unhelpful and unsatisfactory. It demonstrated a lack of respect for the Court, the other parties and the very serious nature of the issues raised by the proceedings. These are criticisms which I would normally consider appropriate to reflect in the terms of costs orders to be made rather than a refusal to deal with the merits of an application brought. I appreciate that where, as here, an application is made under the Legal Aid in Custody Scheme that costs consequences may not be the same as in other cases but this cannot be a proper reason, in my view, for impeding access to a Court determination of the issues raised.

Complaint that Proceedings Improperly Constituted

62. In written submissions and to a lesser extent in oral submissions, Counsel for the First Named Respondent argued in reliance on *Brady v. Revenue Commissioners & Ors.* [2021] IECA 8 that there had been non-compliance with Order 84 Rule 2A occasioned by the failure to join the Court Judge by naming the institution generically. It was contended that the import of Order 84 Rule 2A, introduced by an amendment to the Rules in 2015, was to preclude the identifying by name of the Judge concerned but not the naming generically or the institution or the legal entity.

63. When the fact that the decision in *Brady* was understood by me to be the subject of a positive determination granting leave to appeal to the Supreme Court was raised with counsel for the First Named Respondent, it was then submitted that the Court might not be required to take a position on the question of the constitution of the proceeding in circumstances where the Court of Appeal in *Brady* had addressed the merits of the case also and only made orders rejecting the proceedings as improperly constituted when also rejecting the claim on its merits. Here the First Named Respondent appeared to be inviting me to conclude that I do not need to resolve the question of principle raised in relation to the constitution of the proceedings if I decide that the case has no merit.

64. In response, the Applicant maintained that Order 84 expressly precluded the naming of the Judge and provided that the respondents would be the *legitimus contradictor*. Counsel submitted that there had been an incomplete consideration of the change to the rules in the *Brady* case and that it was therefore not surprising that leave to appeal had been granted by the Supreme Court. Counsel for the Applicant further maintained that were the Court to find that the proceedings were improperly constituted, he would seek liberty to reconstitute the proceedings as necessary. Counsel. Counsel was asked whether there had been compliance with Order 84 rule 22A (c) which requires service on the Clerk or Registrar of the Court concerned. Counsel sought instructions on this question but had not received instructions when the hearing concluded.

65. Despite placing significant reliance on the decision in *Brady* in Opposition papers and in written submissions, the fact that *Brady* was under appeal was raised as an issue by the court. I was not referred in argument by either side to the decisions of the Court of Appeal in *M v. M* [2019] IECA 124 and *O.F. v. O'Donnell* [2012] 3 I.R. 453.

66. *M v. M* is a case, not referred to by the Court of Appeal in *Brady*, where a differently constituted Court of Appeal reached a contrary interpretation of Order 84 Rule 2A to that of the Court in *Brady*. Accordingly, there are two decisions of the Court of Appeal to contrary effect. *O.F.* on the other hand is a case explaining the rationale for the rule change in 2015.

67. As apparent from the judgment of the Court of Appeal, in *M v M* the High Court judge hearing an application for judicial review in respect of an order of the Circuit Court in family law proceedings concluded that the appellant should have joined the judge, at least anonymously, as Respondent and was wrong to name the Respondent as the Respondent in the judicial review proceedings. The proceedings were struck out on the ground that they had been improperly constituted pursuant to O. 84, r. 22. the High Court Judge having determined that the provisions of O.84, r. 22(2A) RSC required an Applicant, even in proceedings brought to challenge an order of a Circuit or District Court judge where no allegation of *mala fides* or misconduct was advanced, to join that judge as a named Respondent to the proceedings, albeit on an anonymous basis. This ruling of the High Court was the subject of appeal to the Court of Appeal. The principal grounds of appeal are summarized in the judgment of the Court of Appeal (Irvine J.) as follows (para. 16):

“(a) The High Court Judge erred in law when she dismissed the application on the ground that it had not been properly constituted by reason of the fact the presiding Circuit Court Judge had not been joined as a respondent in the case, that the judge had not been anonymously joined and that the respondent had been the sole respondent in the High Court proceedings.

(b) The judge misconstrued the stipulations set out in O. 84, r. 22(2A) RSC, that a judge must be anonymously joined as a respondent where no mala fides or misconduct has been asserted, this being the case in this appeal. In such a case, the correct respondent is the party who was the respondent in the High Court, not the judge.

(c) The dictum of Humphreys J. in Hall v. Stepstone Mortgage Funding Ltd. [2015] IEHC 737 applies in that the onus to defend the proceedings falls on the original respondent and not the judge, save in circumstances where flagrant and deliberate allegations are raised against the reviewed judge.

(d) Order 84, r.22(2A) RSC is to be interpreted in line with the dictum in O.F. v. O'Donnell [2012] 3 I.R. 453, a case explaining the rationale for the rule change in 2015.”

68. Having recited the grounds of appeal and the submissions of the Respondent, the Court of Appeal in *M v. M* (Irvine J.) stated (para. 20):

“20. Therefore, it is clear that in circumstances where a determination of the Circuit or District Court is to be judicially reviewed, the judge must not be named, neither by name or anonymised, as respondent and that in its place, as substitute for the judge, the other party or parties in the Circuit or District Court should be joined as respondents - unless allegations of mala fides or other misconduct against the presiding judge form part of the grounds of review.

21. What must follow is that the other party is the legitimus contradictor, and it is up to them to decide whether or not they wish to support the correctness of the decision sought to be challenged. This is so in spite of the fact that they are not the party against

whom relief is sought or who made the decision which is sought to be reviewed. This is an exception to the original rule. In *Hall*, *Humphreys J.* held similarly:

"A judicial review action must relate to an underlying public law function being carried out by somebody, but not necessarily by the respondent. It is not the law that the respondent must itself be a public law entity. In the present case, the action clearly relates to a public law function, namely an order made by a judge of the Circuit Court. Order 84, r. 22(2A)(a) says expressly that "the judge of the court concerned shall not be named in the title of the proceedings" . However, some entity should normally be a legitimus contradictor, and in a case where the action relates to a challenge to a judicial proceeding, that entity is the other party to the underlying proceeding. The onus falls on such a party to defend the decision made by the court, if it wishes to do so, and that is what Mr. Hall is giving [the respondent] the opportunity to do."

This exception finds its limits, however, where allegations of mala fides or other misconduct against the presiding judge underpin the application for judicial review. The rationale for this is that, if such an allegation is made against a judge, they must be named as a respondent and served with the proceedings so that they can participate in the proceedings to defend their good name."

69. It is unfortunate that the Court of Appeal in *Brady* does not appear to have had the benefit of the recent decision of the same Court in the *M v. M* case in reaching its decision. Given that there are now two conflicting judgments from a Court of equal jurisdiction, it will be a matter for the Supreme Court to pronounce finally on the proper interpretation of Order 84 rule 2A.

70. For my own part, I favour the reasoning of the Court of Appeal in *M v. M* to that of the same Court (differently constituted) in *Brady*. It seems to me that the interpretation adopted in *M v. M* is more consistent with the language used in the Rule itself and also with the rationale for the rule change as expressed in *O.F.* In this case there is no allegation of *mala fides* or misconduct against a judge. It is clear that the Applicant's grievances are not directed at the manner in which the proceedings were held but go to the substantive issues raised in the orders.

The complaints advanced in these proceedings are not grounded in the judge's conduct. Accordingly, on one interpretation of the rules and I believe the better one, there was no requirement to include the Judge in some way in the title to the proceedings.

71. Suffice to say that for present purposes and pending clarification of the law by the Supreme Court, I do not consider that it would be a proper exercise of my discretion to dismiss a case simply by reason of non-joinder of the Court whose decision is challenged given that the non-joinder arises from an interpretation of Order 84 rule 2A which is manifestly open from the language of the Rule and where there is clear confusion as to its proper application which remains unresolved. This is particularly so where it is clear from the dictum of Humphreys' J. in *Hall v. Stepstone Mortgage Funding Ltd.* [2015] IEHC 737 that service in accordance with O. 84 rule 22 (2A)(c) is important because it allows the CSSO to become aware of the proceedings and take steps it deems necessary. It is therefore an important consideration in this case that the CSSO is already aware of the proceedings, has filed opposition papers and has been represented by senior and junior counsel from an early stage having been served with proceedings at the outset.

72. Whilst I do not consider that it would be a proper exercise of jurisdiction for me to dismiss the proceedings for procedural irregularity due to a failure to identify the Court in the title to the proceedings, it is nonetheless mandatory that in all proceedings wherein it is sought to challenge an order made by a judge of the Circuit Court or District Court that the proceedings be served in accordance with O. 84, r. 22 RSC regardless of whether or not any allegation of *mala fides* or misconduct is made. This also aids the retention of the public law aspect of an application for judicial review. In *M v. M* the Court of Appeal explained the importance of such service as follows (para. 23):

“This provision is particularly important having regard to the rule change in 2015 which removed the requirement to join as a respondent to the proceedings the judge who made the order under challenge. It is only by service of copies of the proceedings that a judge may determine whether they ought, by reason of the nature of the nature of the claim advanced, to have been added as a respondent to the proceedings.

Therefore, the appellant had been correct to join the respondent as respondent in the judicial review proceedings and not the Circuit Court Judge pursuant to O. 84, r. 22 RSC. The appellant was also correct not to join the Circuit Court Judge, anonymously or otherwise, as a respondent to the proceedings given that O.84, r.22 (2A)(a) RSC specifically precludes such joinder given the absence of any alleged mala fides or misconduct. That is not to say that the appellant was not obliged to serve the registrar of the Circuit Court with copies of the proceeding by reason of the mandatory provisions of O. 84, r. 22(2A)(c) RSC.”

73. When I raised the question of service during the hearing, counsel for the Applicant indicated an understanding that there had been service in accordance with O. 84, r.22(2A)(c) but said he would seek instructions. Those instructions had not been furnished when the hearing concluded. Following the conclusion of the hearing, however, it was confirmed through email communication with the Registrar that the proceedings had not been served on the District Court Clerk.

74. It is noted that issues of non-compliance with O. 84, r. 22(2A)(c) RSC were also considered in *M v. M*. In *M v. M*, the Court of Appeal relied on Humphreys J.’s dictum in *Hall* where the judge observed at para. 26:-

"In any event, if leave were to be granted in a particular case, the applicant is required to serve the District Court Clerk or County Registrar with a copy of the judicial review papers, essentially for information (r. 22(2A)(c)), which provides a channel from the Clerk or Registrar to the Chief State Solicitor if it is thought for any reason that there is anything further that can be contributed by the State to any particular judicial review proceedings. If so, it would be open to the Attorney General to intervene in proceedings of which she is thus made aware, but that is a matter for her..."

75. In *M v. M*, the issue of service was not raised by the parties to the proceedings in the High Court. It appears from the judgment of the Court of Appeal that the consequences of the failure of the appellant to serve the proceedings on the registrar of the Circuit Court was an issue that emerged for the first time in the course of the respondent's written submissions before the Court of Appeal. As recited in the judgment in *M v. M* it was clear from the evidence in that case that the appellant had not complied with sub-rule (2A)(c) at the time the proceedings

were listed for hearing in the High Court. The registrar of the Circuit Court had to be served with copies of the proceedings in order that the court might have jurisdiction to determine the proceedings between the named parties. The Court of Appeal observed, however, that no objection had been raised by the respondent by reason of that particular defect and stated (para. 30):

“And, had it only been the failure of the appellant to serve copies of the proceedings on the Circuit Court Registrar which had concerned the High Court Judge concerning the Court's jurisdiction, rather than the non-joinder of the Circuit Judge as a named respondent on an anonymised basis, that failure would not have been fatal to his claim. The High Court Judge could have adjourned the hearing to allow the proceedings be served. She would, however, have had to grant the applicant an extension of time to allow service be lawfully effected given that the time for so doing under O. 84, r.22(3) RSC had at that time expired. Instead of that she dismissed the proceedings on a legally incorrect premise, thus leading to an unnecessary appeal. This is particularly unfortunate having regard to the extent to which these parties have required access to the courts to deal with their respective rights to their son, J. There was nothing to be achieved by striking out the proceedings. It is indeed unfortunate that the order made has added to the costs to be borne by the parties. Of even greater regret is the fact that the order dismissing the proceedings has delayed the determination of a legal issue that the court, when it granted leave for the issue of the within judicial review proceedings, clearly felt was arguable.”

76. As confirmation of the position regarding service was only communicated after the hearing had concluded, I afforded the parties an opportunity to address the Court in the light of this further development and in circumstances where the issue had been raised not by the parties in advance of the hearing but by me of my own motion during the hearing. In particular, I invited the parties to consider the decision of the Court of Appeal in *M v. M* [2019] IECA 124 and the Court's proposal to direct service on the County Clerk giving the name of the solicitor with carriage of the file in the Chief State Solicitor's Office and noting that service is effected for the purpose of ensuring compliance with O. 84, r.22(2A)(c), to extend time for this purpose, to require confirmation of compliance with the order by means of the filing of an affidavit of service and to afford a further opportunity to apply to the Chief State Solicitor's Office on

instruction from the District Judges concerned, if required. The parties confirmed that they did not wish to make submissions on my proposed course of action.

77. On the authority of the Court of Appeal in *M v. M* and having regard to the fact that the Chief State Solicitors office have been on notice of the proceedings from the outset and participated in full and in the absence of submissions from the parties, I directed service of the proceedings on the County Clerk in accordance with O. 84, r. 22(2A)(c) RSC, extended time for a period of seven days within which service of the within proceedings might be effected and granted liberty to apply on behalf of the District Court judges within a further period of seven days. I further directed the filing of an Affidavit of Service. Subsequently, the CSSO confirmed through correspondence with the Court Registrar that neither of the two District Court judges concerned wished to participate in the proceedings. Accordingly, I am satisfied that there has been sufficient observance of the procedural requirements of O.84 r. 22(2A)(c) RSC as regards service and the constitution of the proceedings to permit me to proceed to determine the substantive issues arising in these proceedings, subject to my decision on the remaining preliminary issue identified on behalf of the respondents.

Availability of an Alternative Remedy and Collateral Attack

78. I agree with the First Named Respondent that this Court should not comb through the transcript of the evidence in the District Court to determine whether the Judge made proper findings on the evidence and thereby step into the shoes of the Judge of competent jurisdiction. This is not the function of the Court in judicial review proceedings.

79. Having said this, I do not consider the main thrust of the case as argued in relation to the s. 117 offences to have been in the nature of an application on behalf of the Applicant that the High Court revisit findings of fact or of law on the evidence in like manner to that of a court hearing an appeal. Insofar as reference was made to the transcript and the conduct of the criminal trial, I understood this to be primarily for the purposes of demonstrating that there was no necessity at the hearing on these charges to demonstrate criminal wrongdoing independent from the breach of the civil order. Indeed, the Court was urged to consider the transcript more at the behest of the Respondents than the Applicant recalling that they advanced a complaint of non-disclosure on the basis of a failure on the part of the Applicant to exhibit those transcripts.

80. A review of the transcript demonstrates, in line with the statutory framework, that the evidence led in respect of the s. 117 offences was directed to satisfying the Court that the civil order had not been complied with. The Applicant's case is directed to the vires of the civil order made and the vires to make conviction orders on foot of evidence led as to a breach of the said civil order and, if necessary to determine the question, the constitutionality of the provisions rather than the findings of the District Court on the evidence which is properly a matter for appeal.

81. I agree that the position with regard to the ss. 7 & 8 orders is less clear and the case advanced for relief appropriate to judicial review proceedings is not set out in terms familiar to judicial review proceedings insofar as the public order convictions are concerned. It seems to me that the case made in respect of the ss. 7 & 8 orders, at its height, is that if the Part 11 proceedings are flawed, then so too are the ss. 7 and 8 proceedings because they were linked.

82. The Second and Third Respondents point out that a full right of appeal lay against the making of the civil order under s. 116 of the Act which could have been exercised within 21 days of the making of the Order. This right of appeal was not exercised. Reliance is placed on the authority of *A v. Governor of Arbour Hill* [2006] 4 I.R. 88 where Murray CJ stated (para. 24):

“A.'s case was finally decided in 2004, he was found guilty, after a plea, and sentenced to prison. The case is over and the decision final. There is no appeal outstanding. In these proceedings he seeks to mount a collateral attack on that final verdict. At no stage prior to or in the course of his prosecution proceedings did he seek to impugn the lawfulness of his prosecution or conviction by reason of any constitutional frailty. A collateral attack arises where a party, outside the ambit of the original proceedings seeks to set aside the decision in a case which has already been finally decided, all legal avenues, including appeal, having been exhausted, for reasons that were not raised in the original proceedings but for reasons arising from a later court decision on the constitutionality of a statute.”

83. The Respondents' reliance on *A v. Governor of Arbour Hill* seems to me to be misplaced. In this case the Applicant seeks to challenge the validity of the orders made within

time and in the manner provided by law. He has not delayed and brought a claim impugning the validity of the order only when a constitutional frailty was identified in other proceedings.

84. Nor do I accept that the Respondents are correct in their argument that an adequate alternative remedy exists. In circumstances where the legislation is challenged as to its constitutionality this is tantamount to requiring the Applicant to hold his hand on a constitutional challenge to the legislation on foot of which he had been prosecuted pending the hearing of an appeal to the Circuit Court on the basis that the Circuit Court might be persuaded to vacate or vary the order, in which case there would be no requirement to pursue the constitutional challenge. The Respondents rely on the *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 381 where Henchy J. stated, in the planning context, that where there was a self-contained administrative scheme the courts should not intervene by way of judicial review where the relevant procedure was adequate to meet the complaint on which the application was grounded.

85. Given the nature of the challenge brought in these proceedings as to the vires to make the civil order coupled with the challenge to the constitutionality of the underlying statutory provisions, it is certainly questionable that an appeal to the Circuit Court could constitute an adequate alternative remedy. I would not decide to deal with these proceedings on discretion on any grounds on the basis that an appeal should have been brought first. Indeed, the time for appealing the civil order had passed by the date the Applicant was arrested and charged with breach of the order in October, 2020.

86. The Respondents further rely on *CC v. Ireland* [2006] 4 I.R. 1 where Fennelly J. stated (para. 134):

“I fully agree with those sentiments. I also believe that, in general, they are applicable to an application such as the present made pending a criminal trial. It is, of course, commonplace for applications to be made to prohibit criminal trials. Such applications are brought by way of judicial review. It is, however, quite inappropriate and a usurpation of the function of the court of trial for an accused person - or the prosecution, for that matter - to seek advance rulings from the High Court as to how any legal provisions should be interpreted in the course of a pending trial. It happens that the present case concerns a trial pending in the Circuit Criminal Court. Judicial

review is not available at all in respect of a trial pending in the Central Criminal Court (the High Court). The proper forum for the determination of legal matters arising in the course of trial is the trial court itself, subject to appeal to the Court of Criminal Appeal. The trial judge has, however, ruled on those matters. He has delivered a considered judgment on the interpretation of the relevant sections. As Geoghegan J. says in his judgment, the Circuit Criminal Court may feel bound by the views of Smyth J. They may also be considered binding, rightly or wrongly, not only in this but in other cases. It may be a long time before this court has an opportunity to consider the substance of the matter. In the ordinary way, decisions of the High Court are open to appeal to this court. In these exceptional circumstances, I am satisfied that the court must entertain the appeal.”

87. It is contended by the Respondents that the Applicant is applying to this Court before and instead of pursuing the remedy of an appeal to the Circuit Court but the circumstances in this case are distinguishable from those in the Circuit Court. This is not a case such as those referred to in *CC*, relied on in submissions, where judicial review is sought during the currency of the trial where relief by way of judicial review will be granted only in the most exceptional circumstances. In cases such as this one I am entitled to consider whether the issue which arises is one that would be best met by the appellate court or the court in judicial review proceedings. It seems to me that given the civil order is challenged as to its vires and that separate issues arise in relation to the constitutionality of the legislation on foot of which convictions have been entered and these are issues which could not be determined by the Circuit Court on appeal, that this is a case where it is appropriate to pursue relief by way of judicial review rather than await the outcome of an appeal to the Circuit Court (by which stage a challenge to the vires of the civil order would be out of time). It is noted in this regard that both the High Court and the Supreme Court proceeded to determine the issue of statutory interpretation as to the availability of a defence raised in *CC*, in the particular circumstances of that case, ever before any trial.

88. The State Respondents further rely on *DC v. DPP* [2006] 1 ILRM 348 Denham J. (McGuinness and MacMenamin JJ. concurring) at p. (350-351):

“The applicant in this case seeks to prohibit a trial in which he is the defendant.

Such an applicant may only succeed in exceptional circumstances.

...

It is this exceptional jurisdiction which the applicant wishes to invoke. Such a jurisdiction to intervene does not apply where the applicant has minutely parsed and analysed the proposed evidence and sought to identify an area merely of difficulty or complexity. The test for this court is whether there is a real risk that by reason of the particular circumstances the applicant could not obtain a fair trial.”

89. Unlike this case, however, in *DC* the Court was dealing with an application to prohibit a trial in the context of an alleged failure to seek out and preserve evidence arising from the refusal of the complainant in that case to identify two men she had visited earlier on the evening of an alleged rape in advance of trial on the basis that while she knew their identity, she did not believe it to be relevant. The Court found that it was the duty of the trial judge to ensure due process and to force the complainant, in advance of the trial, to name persons with whom she may or may not have been intimate prior to the alleged incident would be to introduce a back door to evade the policy laid down by s. 3 of the Criminal Law (Rape) Act, 1981.

90. Insofar as the doctrine of “*reach constitutional issues last*” is argued to oppose relief being granted in judicial review proceedings, it seems to me that this doctrine should properly inform the approach this Court takes to deciding the issues raised in the proceedings but does not operate to require a convicted person to pursue an appeal before challenging the constitutionality of the provisions on foot of which he has been convicted and held in custody. The Respondents cite *PP v. Judges of Dublin Circuit Court* [2020] 1 I.R. 123 in this regard but the decision of the Supreme Court in that case is authority for the proposition that a person charged under a criminal provision (as the Applicant has been) has *locus standi* to challenge it, albeit by reference to their personal circumstances rather than a hypothetical.

91. The Respondents further contend that while they accept that an appeal to the Circuit Court is limited by the jurisdiction of the Circuit Court, that Court has a power to state a case. The power to state a case either by way of consultative case stated or appeal by way of case stated is posited as an alternative remedy to these proceedings. Whilst it is suggested on behalf of the Respondents that this procedure has the advantage of being invoked against proven facts and determinations by the trial courts, the submission ignores the fact that the issue of the constitutionality of the legislation cannot be determined by way of case stated (see *Minister for*

Labour v. Costello [1988] I.R. 235 and *People (DPP) v. Dougan* [1996] 1 IR 544). This argument is further advanced on the mistaken premise that the Court in these proceedings is dealing with a “sanitized” version of events by reason of the failure of the Applicants to address the actual detail of the proceedings which culminated in the making of the civil order in the evidence without taking account of the fact that whilst the transcript of the evidence may not have been available at leave stage, it has been exhibited in full and was available for the purposes of the hearing before me.

92. In all the circumstances, I am satisfied that the within proceedings are properly pursued by way of judicial review and I will now turn to consider the substance of the complaints advanced in these proceedings.

Vires of the Civil Order and Consequential Conviction pursuant to Section 117 of the 2006 Act

A Broad but not Unfettered Power

93. There is no doubt that s. 115 of the 2006 Act provides a statutory basis for the making of a civil order retraining anti-social behaviour as defined in Part 11 of the 2006 Act. The jurisdiction created under Part 11 of the 2006 Act vests the District Court with power to prohibit a wide range of civil wrongs. While the power may not be exercised in respect of an act or omission in respect of which criminal proceedings have issued, a breach of a civil order attracts criminal sanction with the result that through the terms of a civil order made, the person who is made the subject of the that order is liable to criminal conviction for its breach. The wrongdoing which gives rises to a breach of the order may or may not be wrongdoing which would be independently amenable to criminal sanction.

94. It is clear that while the power created is a broad power, the exercise of that power is subject to the constraints which operate by reason of the Constitution. If two or more constructions of the provisions are reasonably open, one of which is constitutional and the other unconstitutional, it is to be presumed that the Oireachtas intended only the constitutional construction (*McDonald v. Ors. na gCon (No. 2)* [1965] IR 217 and *D.K. v. Crowley & Ors* [2002] 2 I.R. 743).

95. In this case, the first issue which arises is as to whether the District Court judge exceeded his jurisdiction under that section in making an order in the terms of the civil order in this case. It is only where I conclude that the District Court Judge has not exceeded his jurisdiction that it becomes necessary to determine whether the statutory provisions which vest jurisdiction in the District Judge withstand constitutional scrutiny. Indeed, the case advanced on behalf of the Applicant was clearly to the effect that the District Court had exceeded its jurisdiction under s. 115 of the 2006 Act in making the civil order. The case that ss. 115 and 117 were unconstitutional was very much secondary to this primary contention.

96. Accordingly, the thrust of the Applicant's case that the civil order made was *ultra vires* the District Court Judge is that the power was not exercised in a constitutionally compliant manner having regard to the Applicant's rights under Articles 38.1 and/or Article 40.1 and/or 40.3 and/or 40.4 and/or 40.6 of the Constitution. The Applicant's case in the alternative, and on the basis that s. 115 cannot be construed in a constitutionally compliant manner, is that ss. 115 and 117 are unconstitutional as incompatible with these same constitutional provisions.

97. Whether or not a court of local and limited jurisdiction is acting within its jurisdiction is not confined to an examination of the statutory limits of the jurisdiction imposed on the court but involves an examination of whether or not the court is performing the basic function for which it is established. Even if all of the formalities of the statutory limitation of the court be complied with and if the court procedures are formally satisfied, the court in such instance is not acting within its jurisdiction, if, at the same time, the person accused is deprived of any of his basic rights of justice at a criminal trial (see *The State (Healy) v. Donoghue* [1976] IR 325, Gannon J.).

98. As set out above, anti-social behaviour is defined in broad terms under s. 113 of the Act. It covers a very wide range of criminal offences but also behaviour which is not criminal at all. The Act states that a person behaves in an anti-social manner if his behaviour causes or is likely to cause to another person or persons who are not of the same household as the perpetrator:

- harassment;
- significant or persistent alarm, distress, fear or intimidation; or
- significant or persistent impairment of their use or enjoyment of their property

99. The words '*is likely to cause*' in the definition means that the court may not always be concerned with a situation where the defendant has actually harassed someone or caused serious fear or persistent danger.

100. As clear from s. 114 any member of the Garda Síochána may issue a behaviour warning to a person who has behaved in an anti-social manner. The warning will specify what the nature of the behaviour is and when and where it took place. It will require the person to desist from the behaviour in question and warn him that a failure to do so may result in an application to court for a civil order. The warning remains in force for at least 3 months.

101. The fact that anti-social behaviour extends to non-criminal activity is significant in my view as it involves the Gardaí and potentially the criminal process in an area which is otherwise the preserve of the civil process. In the event of a person breaching a behaviour warning or being made subject to at least 3 such warning in less than 6 consecutive months, s. 115 provides that an application can be made to the District Court for a civil order. The judicial process which ensues, however, is not the equivalent of that pertaining to a criminal nor even of a typical civil trial.

102. Undoubtedly the proceedings are civil in form and the standard of proof is defined as the civil standard. The order that issues is officially designated a 'civil order' but despite the civil nature of the proceedings, the case for the civil order is presented by a senior member of the Garda Síochána. Evidence in support of the case for a civil order included the fact that behaviour warnings have issued to the defendant and this evidence was tendered by Garda members. The accused does not have the benefit of protections that normally attach to criminal proceedings. It is for the Garda members to persuade the District Court Judge, on a balance of probabilities, that the applicant had behaved in an anti-social manner and that an order was necessary to prevent him from continuing to behave in that manner.

103. As we have also seen in this case, although it is designated as civil in nature, breach of a civil order made under s. 115 does not invoke the normal contempt of court procedure, but in fact constitutes a criminal offence and the Applicant in this case has been convicted of such an offence.

104. In my view, the open definition of ‘*anti-social behaviour*’ combined with the low evidential standards required in the application process gives rise to the potential for an unwarranted interference with individual rights inhering in people, such as the Applicant, whose views or behaviours are unpopular and even distasteful or discriminatory but not criminal. Some of the behaviour may constitute a civil wrong (most likely nuisance) while other behaviour may not constitute any wrong at all in law. Accordingly, the District Court in exercising a jurisdiction under Part 11 of the 2006 Act is required to be vigilant to ensure that the wide power vested in the Court is exercised within the parameters of the Act constitutionally construed.

Due Course of Law

105. The case urged on behalf of the Applicant is that the orders made pursuant to ss. 115 and 117 fail to vindicate the Applicant’s right not to be tried on a criminal charge save in due course of law. This is said to occur because the civil order made provided for an offence whose ingredients are impermissibly arbitrary and vague and criminalizes an act without the requirement of it being established beyond reasonable doubt that the said person had deviated from a clearly prescribed standard of conduct (Article 38.1).

106. The phrase “*due course of law*” requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society (*The Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129, at p. 152 of the report, cited with approval in *King v. AG* [1981] I.R. 233, 241). Inherent in the concept of due process of law is also that citizens shall be held equal before the law. It is clear from the facts of this case that the effect of the making of the civil order is to make behaviour unlawful when carried on by the Applicant which would be perfectly lawful if done by any other citizen e.g. speak publicly or sing in a public place.

107. In such circumstances, the question which presents is whether it can be said that the elements of the offence which give rise to a criminal liability have been “*prescribed by law*” or otherwise meet the requirements of legal certainty inherent in the protection of the Applicant’s due process rights.

108. The Respondents' position is that the requirement for legal certainty is met in this case because the Applicant heard the evidence in the District Court which resulted in the civil order and knows exactly why the Order was made. In returning to the Bullring on the same day the civil order was made to engage in preaching, it is contended that he acted knowingly and in flagrant disregard of the civil order by doing the very thing the civil order prohibited.

109. Where a civil order is sufficiently closely tailored to the evidence given as to the behaviour which was condemned by the Court as constituting anti-social behaviour and drawn in a manner which captures that behaviour, then a recurrence of this same behaviour might justifiably result in the criminalisation of a defendant having regard to principles of legal certainty. In my view, however, the civil order in this case does not meet these standards having regard to the facts as established in evidence in this case. The evidence in the District Court was directed to loud, persistent, aggressive and offensive speech and did not extend to singing. The civil order goes much further and prohibits all public speaking and not just loud, persistent, aggressive and offensive speech. Accordingly, I do not accept that the requirements of legal certainty inherent in the protection of the Applicant's due process rights are met in this case in the terms of the civil order made by reference to the evidence actually given in the District Court which led to the making of the Order. The terms of the civil order made go beyond the behaviour found to be anti-social to encompass behaviour which is not legally objectionable. It seems to me that an order in keeping with the behaviour addressed in evidence could have been tailored to the behaviour which was found to constitute anti-social behaviour by, for example, precluding the use of an amplifier (loud) or limiting the time within which speech might take place (duration) or prohibiting homophobic or racist or anti-feminist speech (content) or to otherwise specifically identifying the parameters of what was considered to be the anti-social element of the behaviour sought to be controlled by the making of an order.

110. Further, it seems to me that in interpreting the civil order, both the prosecuting guard and the District Court Judge in convicting pursuant to s. 117, construed it as encapsulating singing a hymn without any requirement that the singing be loud, persistent, aggressive or offensive. Having regard to the requirement that penal provisions be clear and strictly construed, I am not satisfied that the civil order as drawn clearly and unambiguously criminalizes the singing of a non-offensive hymn in a public place in a manner which satisfies the requirements of Article 38.1 of the Constitution. In my view it cannot be said that the civil order as drawn is sufficiently precise to reasonably enable the Applicant to foresee the

consequences of singing in public or indeed engaging in any speech no matter how unobjectionable, with or without amplification and to this extent I consider the terms of the civil order to be impermissibly vague and uncertain (see *Dokie v. DPP* [2011] 1 IR 805). To my mind, the offence purportedly created by the civil order is ambiguous and imprecise and lacks the clarity necessary to create a criminal offence. It is also capable of being extended to behaviour which has not been found to be anti-social following a determination on evidence led in the District Court.

Principle of Equality before the Law inherent in concept of Justice

111. It seems to me that in criminalizing a broad range of behaviour in a manner which is not sufficiently tailored and referable to evidence adduced before a Court, a broadly drawn civil order also offends against the concept of justice by infringing the principle of equality before the law, declared in Article 40.1, by reason of extending the reach of the criminal law to the Applicant and not others who engage in the same behaviour in a manner which excessively interferes with the Applicant's rights.

112. The possibility of the Applicant being convicted for breach of the Civil Order by reason of a previous civil finding of anti-social behaviour made on specific evidence without there necessarily being any recurrence of precisely the same behaviour that has been adjudged as anti-social offends concepts of justice recognised in decisions of the Superior Courts in cases such as *King v. AG* where the previous findings of a court as to the character or conduct of the Applicant were identified as features which require meticulous care to ensure that a person is not convicted except upon clear and unmistakable evidence that he has committed the particular offence charged against him and without the requirement for satisfactory evidence of criminal wrongdoing.

113. In *King*, a provision which allowed conviction on the basis of behaviour which was perfectly lawful for any other citizen was found to offend against the constitutional concept of justice, which imports fairness and fair procedures and requires that all citizens be held equal before the law. Finding a portion of the provisions contained in s. 4 of the Vagrancy Act, 1924 (as amended) unconstitutional in that case, Henchy J. observed as follows (p. 257):

“the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man’s lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance.

I shall confine myself to saying, without going into unnecessary detail, that the offence, both in its essential ingredients and in the mode of proof of its commission, violates the requirement in Article 38.1 that no person shall be tried on any criminal charge save in due course of law; that it violates the guarantee in Article 40.4.1 that no citizen shall be deprived of personal liberty save in accordance with law – which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution; that, in its arbitrariness and its unjustifiable discrimination, it fails to hold (as is required by Article 40.1) all citizens to be equal before the law; and that it ignores the guarantees in Article 40.3, that the personal rights of citizens shall be respected and, as far as practicable, defended and vindicated, and that the State shall by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

114. Kenny J. expressed his views in similarly trenchant terms when he stated (p. 263):

“It is a fundamental feature of our system of government by law (and not by decree or diktat) that citizens may be convicted only of offences which have been specified with

precision by the judges who make the common law, or of offences which, created by statute, are expressed without ambiguity.... There is Irish authority for the proposition that a person may be convicted of a criminal offence only if the ingredients of, and the acts constituting, the offence are specified with precision and clarity”.

115. While it was urged on the Court that it is not unusual for legislation to criminalise non-compliance with a notice issued under statute (examples cited included a prohibition notice issued under the Safety, Health and Welfare at Work Act, 2005 or a barring order under the Domestic Violence Act, 1996), I consider that the open-ended nature of the civil order in this case marks a departure from other statutory orders to which reference was made such as, for example, the barring order or the safety order under the Domestic Violence Act 1996. Under the 1996 Act, a person subject to a barring order may be required not to use or threaten to use violence against, molest or put in fear the applicant or a dependant. It is clear that this order is targeting specific wrongs against named individuals in a domestic context. A civil order under s. 115 the 2006 Act is not expressly so limited, at least not in the same way, but the Court in the exercise of its jurisdiction is required to operate the provision constitutionally.

Restriction on Fundamental Right to Communicate and the Proportionality Test

116. In this case the civil order restricts speech. Accordingly, I am not only considering areas of human activity which are perfectly lawful but also human activity which benefits from constitutional protection and is therefore safeguarded under the Constitution against arbitrary or disproportionate interference. Under Article 40.3 the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen which includes the right to freedom of expression of convictions and opinions which are also expressly guaranteed under Article 40.6 of the Constitution. As recognised in the following terms in *Murphy v. IRTC* [1999] 1 IR 12, the right to communicate and to express opinion is a fundamental right (at p. 24):

“It appears to the Court that the right to communicate must be one of the most basic rights of man. Next to the right to nurture it is hard to imagine any right more important to man's survival. But in this context one is speaking of a right to convey one's needs and emotions by words or gestures as well as by rational discourse.

Article 40.6.1° deals with a different though related matter. It is concerned with the public activities of the citizen in a democratic society. That is why, the Court suggests, the framers of the Constitution grouped the right to freedom of expression, the right to free assembly and the right to form associations and unions in the one sub-section. All three rights relate to the practical running of a democratic society. As Barrington J stated in Irish Times Ltd v Ireland [1998] 1 IR 359, the rights of the citizens “to express freely their convictions and opinions” guaranteed by Article 40.6.1° is a right not only to communicate opinions but also to communicate the facts on which those opinions are based. If this means that there is a certain overlapping between the right to communicate impliedly protected by Article 40.3 and the right of the citizens freely to express their convictions and opinions guaranteed by Article 40.6.1°, so be it. The overlap may result from the different philosophical systems from which the two rights derive.”

117. Accepting that the rights guaranteed by Articles 40.3 and 40.6.i are not absolute but may be regulated in the interests of the common good (see *Ryan v. AG* [1965] I.R. 294 at p. 312 and *Murphy v. IRTC* [1999] 1 I.R. 12, 25), any regulation of the right to freedom of expression must be effected in accordance with the principle of proportionality as expounded in *Heaney v Ireland* [1994] 3 I.R. 593.

118. In *Heaney v Ireland* (at p 607), Costello J. (as he then was) (whose judgment on this issue was upheld on appeal by the Supreme Court) described the principle of proportionality as follows:-

“In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-

- (a) *be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,*
- (b) *impair the right as little as possible, and*
- (c) *be such that their effects on rights are proportional to the objective ...”*

119. In *Murphy v. IRTC*, the Supreme Court, applying the *Heaney* test, concluded that the limitation placed on the various constitutional rights was minimalist. The applicant had the right to advance his views in speech or by writing or by holding assemblies or associating with persons of like mind to himself. He had no lesser right than any other citizen to appear on radio or television. The only restriction placed upon his activities was that he could advance his views by a paid advertisement on radio or television.

120. It seems to me that this case is distinguishable from *Murphy v. IRTC* having regard to the breadth of the ban on speech provided for under the terms of the Civil Order made in respect of the Applicant. It is recalled that in *Murphy v. IRTC* the Court was considering a carefully crafted statutory provision. In the case of the offence created by civil order under Part 11 of the 2006 Act it is true that the behaviour is “*prescribed by law*” by reason of being expressed in the terms of the civil order but the parameters of the offence created under the terms of the civil order are not as clear as one created by statute and an onus is placed on the District Judge to ensure proportionality in the manner in which the power is exercised.

121. I do not find the analogy, referred to in argument, with s. 10 of the Non-Fatal Offences Against the Person Act, 1997 which deals with harassment and provides for the making of an order prohibiting communication, the breach of which constitutes a criminal offence to be persuasive in establishing the legitimacy of an order restricting speech on pain of criminal sanction under the Part 11 regime. Closer scrutiny of s. 10 of the 1997 Act demonstrates that s. 10(1) of the 1997 Act creates an offence of harassment. Section 10(3) provides that the Court may, upon a finding of an offence of harassment, order that the convicted person not communicate by any means with the other person or not approach within a specific distance of that other person. Section 10(4) makes a failure to comply with the terms of an order under s. 10(3) a criminal offence. Section 10(5) provides for the making of an order under s. 10(3) even where the Court is not satisfied on the evidence to convict under s. 10(1) of the 1997 Act. The restriction on communication is limited, however, by the terms of the legislation, in much the

same way as it was in *Murphy*. In the case of the Part 11 regime, the restriction derives from the obligation to exercise powers in a constitutionally compliant manner and having due regard to the requirements of the doctrine of proportionality as more particularly provided for in s. 115(1)(b) of the 2006 Act.

122. The sanction of detention for breach of a civil order also raises potential issues concerning the principle of proportionality in sentencing which requires that the penalty be proportionate to the circumstances of the offence. There is no evidence that the Applicant's behaviour on either day caused actual offence or distress to any person, and he was prosecuted for breach of the civil order *simpliciter*. The use of the penalty of imprisonment in this case to punish acts of nuisance which are not necessarily criminal in nature nor indeed constitute any wrong in law, that is were it not for the terms of the civil order, is to my mind disproportionate where the order is not clearly tailored and narrowly drawn.

123. Further, while I can accept that the interference with constitutional rights effected by the terms of the civil order was for a legitimate purpose insofar as the restraint of anti-social behaviour found by the District Judge is concerned, as I have found that the terms of the civil order go beyond what was required, it must fail a proportionality test.

124. I am satisfied that in consequence of the fact that the Civil Order is overly broad in the terms in which it was drawn that is *ultra vires* the powers of the District Judge under the 2006 Act. It cannot be said, as it was in *Murphy*, that the restriction on constitutional rights in the present case is "very slight" bearing in mind the Applicant's circumstances and the fact that the order applies in respect of the area where he lives. I am not satisfied that the Civil Order in its terms impairs the various constitutional right to freedom of expression and to communicate information as little as possible or that its effects on those rights are proportional to the objective of the civil order or indeed the legislation in providing for the making of a civil order.

Whether the Power is Hopelessly Broad

125. The concern as I see it is that the civil procedure provided for under Part 11 of the 2006 Act imposes an order on individuals on the basis of a potentially subjective and variable definition of anti-social behaviour which does not have to be formally proved to a criminal

standard. Breach of a civil order obtained in this manner, may result in the imposition of a term of imprisonment as it did in the Applicant's case. Given the wide-ranging nature of interference with personal rights permitted under ss. 115 and 117, it follows that a Judge invited to make a civil order must do so in a manner which is tailored closely to the behaviour which it has found to be anti-social and extends no further than is necessary to restrain a recurrence of offending behaviour with due regard to the fact that a breach of the order results in a finding of criminal liability.

126. I am mindful that in *D.K. v. Crowley & Ors.* [2002] 2 I.R. 744, the Supreme Court, confronted with a situation where the absence of a limit as to time on the exercise of the statutory power to grant an interim barring order, proceeded to find s. 4(3) of the Domestic Violence Act, 1996 unconstitutional rather than condemning the order made by the District Judge in which he did not fix an early hearing date for the barring application proper. The reasoning of the Supreme Court (Keane CJ) in *DK* has some resonance in this case albeit in *DK* other considerations and in particular the *ex parte* nature of the order, arose. Despite the obvious differences between the statutory provisions and powers under consideration, the principles identified in the Supreme Court judgment are of some assistance having regard to the similarities between the order made under s. 115 and a barring order and the reliance of the Supreme Court on the requirements of proportionality and controlled interference with rights. As Keane CJ stated (p. 759):

“the courts have always been concerned to ensure that the interference thus effected with what may very well be a right which the defendant is entitled to exercise without such interference, is as limited in its duration as is practicable.....The interim barring order, moreover, even when obtained on an ex parte application, is not merely mandatory in its effect but brings in its wake draconian consequences which are wholly foreign to the concept of the injunction as traditionally understood. A person who fails to comply with such an injunction commits no offence, although the plaintiff may put in train the process of attachment for contempt in order to obtain compliance with the order. In the case of an interim barring order obtained ex parte in the absence of the respondent, the latter automatically commits a criminal offence in failing to comply with the order, even if it should subsequently transpire that it should never have been granted. He or she is, moreover, liable to be arrested without warrant by a garda having a reasonable suspicion that he or she is in breach of the order.”

127. In *DK*, the Supreme Court found that the power to grant an interim barring order *ex parte* absent a statutory safeguard as to time could not be saved from a finding of unconstitutionality even presuming in accordance with the principle in *East Donegal Co-operative Livestock Mart Ltd. v. AG* [1970] I.R. 317 which entitles the Court to presume that the District Court and the Circuit Court on appeal will ensure that the requirements of constitutional justice will be observed. This was because the statute conferring jurisdiction on the District Court expressly provided that the interim order was to continue until the determination by the court of the application for a barring order in consequence of which the Supreme Court considered the District Court had no jurisdiction to impose a shorter time limit at the expiration of which the interim order was to expire. As in this case the State in *DK* relied on the fact that an application could have been made to the District Court to vary the order but the Court found that the possibility of such an application did not operate to save the provision.

128. There is a material difference in my view between s. 115 of the 2006 Act and the provisions under consideration in *DK*. Whereas the District Court was found to have no jurisdiction to impose a shorter time-frame under s. 4 of the Domestic Violence Act, the District Court in making an order pursuant to s. 115 is not only empowered but constrained by s. 115(1)(b) to tailor the order to that which is “*necessary to prevent the respondent from continuing to behave*” in the manner which has been found to be anti-social.

129. It seems to me therefore that the statutory framework established under Part 11 is framed in a manner which is directed to ensuring a constitutionally compliant exercise of what is clearly a far-reaching power by requiring the Court to tailor its order in a manner which ensures that it is no broader than necessary. As noted above, however, the civil order made in this case is not limited to anti-social behaviour of the type which was addressed in evidence before the District Court in August, 2020 but extends to all public speaking (and on the District Courts’ subsequent interpretation also encompasses singing a hymn in public).

130. Accordingly, it is my view that the civil order is not properly made in accordance with s. 115(1)(b) or in accordance with the requirements of proportionality in that it interferes excessively with the Applicant’s constitutionally protected rights including his due process rights (by reason of vagueness and over reach) and his rights to freely express his opinions. The civil order lacks both the precision and the clarity required to create a criminal offence and

is overly broad in its terms by criminalising in an arbitrary and vague manner behaviour when carried out by the Applicant which is otherwise lawful.

131. I am satisfied that the Civil Order impugned in this case was made in a manner which did not observe the proper parameters of the District Court's jurisdiction and in consequence resulted in an unconstitutional interference with the Applicant's rights. A Court in exercising a jurisdiction to make a civil order must do so in a manner which is targeted, clear, precise, tailored, narrowly drawn and directed to specific behaviour which might properly be treated as criminal behaviour if the Court is to exercise that jurisdiction to make orders which respect the requirements of the Constitution. The Civil Order made in this case was not sufficiently tailored, targeted, clear, narrowly drawn or precise and for that reason resulted in an unconstitutional interference with the Applicant's rights and was ultra vires the powers of the District Court.

Vires of the Orders made under Sections 7 & 8 of the Criminal Justice (Public Order) Act, 1994

132. No constitutional issue arises in respect of the public order convictions secured against the Applicant save insofar as it appears to be part of the Applicant's case that the said convictions are tainted by reason of their connection with the civil order. It is clear from the transcript however, that evidence was led by the prosecution to ground these convictions independently of the contended breach of the civil order. I am satisfied that the conviction orders made were within the jurisdiction of the District Court pursuant to terms of the offences created under ss. 7 & 8 of the 1994 Act and on the basis of the evidence led.

133. There being no constitutional challenge to ss. 7 & 8 of the Criminal Justice (Public Order) Act, 1994, I do not consider it necessary to consider the so-called public order offences any further and I do not propose to interfere with the Orders made in respect of these charges.

Constitutionality of Part 11 of the 2006 Act

134. Given that the Civil Order made under s. 115 exceeded the parameters of the District Court's jurisdiction under that provision because it was not properly tailored to the offending behaviour which had been the subject of evidence before the District Court, it is not necessary

for me to decide on the issue of the constitutionality of the provisions raised in these proceedings. I would merely observe that I do not accept as necessarily correct the submission advanced before me that the case advanced on behalf of the Applicant as to the constitutionality of the provisions was radical and would encompass an offence of breach of a barring order or an offence of failing to comply with notification requirements under the Sex Offenders Act, 2001. It seems to me that other provisions identified to me in argument are limited and targeted provisions where the offence is expressly provided for in clear terms. The parameters of offences created in the comparator legislation are fixed by limits in the legislation itself. It seems to me that the provisions under consideration in this case are novel because the parameters of the offence are set by the District Court within an area of broader discretion. Further, unlike the statutory restriction on free speech considered in *Murphy v. IRTC*, the offence created by a particular civil order under the 2006 Act does not have the public or constitutional status of a law which has passed through the legislative process and undergone legislative and constitutional scrutiny in that process. In consequence, the question begged, but which does not require to be determined in this case, is whether the civil procedure created under Part 11 results in the improper subversion of the requirements of the criminal law as to legal certainty.

CONCLUSION

135. The risk of unwarranted interference with personal rights associated with the broad definition of anti-social behaviour which occurred in this case is compounded by the lower standards of evidence and proof required under the legislation to criminalize behaviour which is the subject of a civil order. As the civil standard applies to a civil order made, the behaviour in question, even if capable of amounting to a criminal offence, will therefore not have to be proved to a standard of beyond all reasonable doubt and a defendant can be placed under a civil order even if there is reasonable doubt as to the behaviour in question and thereafter convicted of an offence by reason of the failure to comply with a civil order. The nexus between the original application for a civil order and its criminal counterpart under s. 117 is a cause for real caution for the part of the judge who is required to give effect to the provision as the initial civil procedure defines the outer limits of the behaviour which can constitute a criminal offence in circumstances where either i) in respect of behaviour which actually amounts to a crime, a conviction may be obtained without proving the crime; and ii) in respect of behaviour which is

in breach of a civil order but does not otherwise constitute criminal wrongdoing, a conviction may also be obtained.

136. I have decided that the standards of fairness inherent in the concepts of constitutional justice and equality before the law which inhere in our constitutional order are not met where a civil order is drawn under s. 115 in a manner which extends beyond the mischief of anti-social behaviour covered in the evidence led before the District Court and in a manner which encroaches into areas of human activity which are perfectly lawful and are constitutionally protected. By failing to tailor the civil order made to capture recurrence of behaviour adjudged on the evidence led to be anti-social, the District Judge exceeded the jurisdiction vested under Part 11 of the 2006 Act. Similarly, the failure to tailor the order to the offending behaviour results in a disproportionate interference with the Applicant's personal rights including his right to equality before the law and his right to freely communicate.

137. For these reasons, I am satisfied that the orders made under s. 115 and 117 of the 2006 Act are ultra vires and should be quashed.

138. It remains an open question, to be determined in an appropriate case, as to whether together ss. 115 and 117, operating in a manner which results in a conviction on foot of behaviour which either is or is not in itself criminal wrongdoing on a civil standard, results in a conviction obtained otherwise than in accordance with due process of law.