

Bill No: 2020/271 JR

THE HIGH COURT
BEFORE THE HONOURABLE MR JUSTICE MEEHAN

28 April 2020

GEMMA O'DOHERTY AND JOHN WATERS

v.

THE MINISTER FOR HEALTH IRELAND AND THE ATTORNEY GENERAL AND
DÁIL ÉIREANN SEANAD ÉIREANN AND AN CEANN COMHAIRLE

Counsel for the Respondent:

Mr P McCann, SC
Mr G Meehan, BL

Counsel for the Notice Parties:

Mr F Kieran, BL

Gemma O'Doherty & Anor v. The Minister for Health Ireland & Ors
28 April 2020

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1 REGISTRAR: 2020/271 JR, Gemma O'Doherty and John Waters applicants,
2 Minister for Health Ireland and Attorney General respondents.

3 JUDGE: Yes.

4 MR WATERS: Judge, my name is John Waters, this is my colleague.

5 JUDGE: Yes, Mr Waters, yes.

6 MR WATERS: I want to raise a matter of very grave concern concerning --
7 concerning the Constitution.

8 JUDGE: Yes.

9 MR WATERS: Again this morning, the public has been barred from this court.

10 JUDGE: Yes.

11 MR McCANN: Judge, just before Mr Waters begins, I might --

12 JUDGE: Hold on a second, yes?

13 MR McCANN: I was going to say I might introduce myself, Judge.

14 JUDGE: Yes, I appreciate -- yes, Mr McCann, yes.

15 MR McCANN: Yes, so I'm Patrick McCann.

16 JUDGE: Yes.

17 MR McCANN: I'm appearing for the intended respondents, the Minister for Health
18 Ireland, the Attorney General, and I appear with Mr Meehan and Mr Eoin Carolan,
19 Judge.

20 JUDGE: Yes.

21 MR McCANN: Thank you.

22 MR KIERAN: Judge, and just on that note, I appear instructed by the office of
23 parliamentary legal advisers for Dáil Éireann, Seanad Éireann and An Ceann
24 Comhairle, subject to a procedural authorisation internal to Dáil Éireann. These
25 entities have been added as notice parties by order of Ms Justice Murphy last week,
26 Judge, on the request of the respondents.

27 JUDGE: Yes.

28 MR KIERAN: And on consent of the applicants, Judge. Essentially, I don't need to
29 get into it now, our intention, Judge, will be that various of the complaints made
30 against the notice parties are non-justiciability.

31 JUDGE: Yes, I'm sure, I'm sure that's fine, yes, yes.

32 MR KIERAN: May it please the Court.

33 JUDGE: Now, sorry, you have an issue concerning a public hearing, yes?

34 MR WATERS: Yes, just to read out briefly, Article 34, "Justice shall be

1 administered in courts established by law by judges appointed in the manner
2 provided by this Constitution and save in such special and limited cases as may be
3 prescribed by law shall be administered in public".

4 JUDGE: Yes, yes.

5 MR WATERS: We went through this the last day, the judge suggested to us that the
6 necessity for the public to be present was covered by the presence of the media.
7 However, I don't believe that that's correct, it's not a contemporaneous presence in
8 the first place. But moreover, while I'm not wishing to reflect in any way on this
9 gentleman who does I'm sure a fine job.

10 JUDGE: Yes.

11 MR WATERS: The unfortunate situation is that when the material goes into the
12 hands of media, which are in a sense, in essence corrupt, that the facts will be twisted
13 as happened in relation to the case last week, and there was gross misrepresentation.
14 So there was virtually no coverage of the content of the hearing and the entire
15 exercise was used as a way to discredit myself and Ms O'Doherty, or to attempt that
16 endeavour. The -- we were informed further that the court was acting on a directive
17 by the Chief Justice. But the Chief Justice directive does not have the status of law
18 and cannot substitute for an Act of the Oireachtas. And there is nothing in the Covid
19 legislation or in any other legislation that I'm aware of that allows the courts to be
20 cleared of the public. And therefore, it cannot be the case that justice which takes
21 place in these courts can be called the administration of justice. The gardaí outside,
22 when asked why they were refusing to allow people in, were unable to cite any piece
23 of legislation to justify their refusal. And that's the difficult situation we're now in,
24 that we're in a hearing which is actually not a properly constituted hearing.

25 JUDGE: Yes.

26 MR WATERS: And I don't think we can really continue, and I don't think that the
27 business of the Court can proceed in these circumstances, thank you, Judge.

28 JUDGE: Yes, thank you. Well, Article 34 of the Constitution provides that justice
29 shall be administered in courts established by law, judges appointed and so on, and
30 save in such special and limited cases as may be prescribed by law shall be
31 administered in public. Now, the fact of the matter is that in public does not mean
32 that every member of the public who may wish to attend personally in court can do
33 so. There are at the moment obvious restrictions concerning -- which have arisen by
34 reason of the Covid pandemic, which necessarily means that the number of persons

1 who can actually attend in court is limited. And also, it seems to me that having
2 regard to the various measures in place to limit the spread of Covid, that a court
3 should proceed with the minimum number of persons present. Now, the fact is that
4 one can still have and it does happen on many occasions, a hearing in public even
5 though members of the public are not actually present. However, provided the
6 proceedings in court can be covered by the media and I'm quite satisfied that as
7 matters stand, as you have correctly pointed out, a member of the media is in court
8 and therefore is free to report every single matter that occurs in the course of these
9 proceedings. Now, you have some criticism of the media, well that's really a matter
10 between yourselves and --

11 MS O'DOHERTY: Judge, may I interrupt?

12 JUDGE: No, no, no, no, no, I'm sorry, I'm actually I'm giving my ruling on this
13 matter, thank you. And you of course have -- you may well have criticisms of the
14 manner in which it is -- the proceedings here are actually reported and of course you
15 are perfectly free to contact the media concerned to point out that this is inaccurate or
16 this wasn't properly stated. And in addition, I understand my colleague on the
17 previous occasion gave you liberty to take up the transcript of the hearings and --

18 MS O'DOHERTY: The media is funded by this side, Judge.

19 JUDGE: Ms O'Doherty, Ms O'Doherty, we're actually not going to get anywhere
20 unless I'm allowed make my rulings.

21 MS O'DOHERTY: The media is funded by the State side.

22 JUDGE: So I am -- I am making my ruling --

23 MS O'DOHERTY: That is highly corrupt.

24 JUDGE: -- that I am perfectly satisfied that this hearing is in public, given the
25 media's presence, and also the fact that you have access to a -- though it doesn't
26 necessarily mean it's not in public. But in any event you do have access to a written
27 transcript. So I'm entirely satisfied that the hearing which I'm going to embark on is
28 entirely in accordance with the provisions of Article 34(1) of the Constitution.

29 MS O'DOHERTY: Well, we utterly dispute that, Judge.

30 JUDGE: Well, you may well dispute it, but that -- thank you.

31 MS O'DOHERTY: And we would like a copy of the DAR, these are not kangaroo
32 courts.

33 JUDGE: Thank you, Ms O'Doherty, Ms O'Doherty --

34 MS O'DOHERTY: You are obliged to do justice in public.

1 JUDGE: -- I am proceeding now to the hearing. Now, as I understand this matter --

2 MS O'DOHERTY: When will the DAR be made available?

3 JUDGE: Please, please, don't --

4 MS O'DOHERTY: No, can we ask when --

5 JUDGE: -- please don't talk across me. As I understand it this matter --

6 MS O'DOHERTY: When will the DAR be made available?

7 JUDGE: Excuse me, this matter is in for mention today for the purposes of
8 ascertaining are the parties in the position to proceed with the hearing, which
9 I understand has been fixed for Tuesday the 5th of May. So what's the position on
10 that, Mr Waters?

11 MR WATERS: Well, we're awaiting the other side to submit their papers, their
12 affidavits, et cetera, in response to our statement grounding our application.

13 JUDGE: Yes, right.

14 MR WATERS: And the hearing last week was somewhat confusing for us, because
15 it was suggested to us that we were on the wrong track. We believe and we are now
16 -- have reassured ourselves that this is not the case.

17 JUDGE: All right.

18 MR WATERS: We wish to proceed by judicial review.

19 JUDGE: Yes, okay.

20 MR WATERS: And we wish to expedite that matter, because we face, I would say,
21 we're on the cusp of the greatest crisis ever to face this country in independence.

22 JUDGE: Yes.

23 MR WATERS: And for that reason, we feel that it's necessary to expedite it and we
24 felt last week very strongly that there was serious, serious attempts to delay,
25 obfuscate, prevaricate and filibuster in relation to these hearings. We do not want
26 these hearings to go on beyond a matter of weeks.

27 JUDGE: Yes.

28 MR WATERS: Because the crisis will escalate very rapidly now when facts become
29 clearer.

30 JUDGE: Well, Mr Waters, as you know what I am principally concerned with today
31 is ensuring that this hearing can proceed as was fixed for next Tuesday. Now, as
32 I understand it on the previous occasion, Ms Justice Murphy made a number of
33 orders and you can correct me if I'm wrong. She directed that the Dáil and Seanad,
34 the Cathaoirleach of the Seanad, Ceann Comhairle of the Dáil be joined as notice

1 parties, that the respondent, that's Mr McCann's clients, would serve proceedings on
2 the proposed notice parties by close of business last Tuesday; is that correct?

3 MR WATERS: Yes, Judge.

4 JUDGE: Okay, that the respondents and proposed notice parties be at liberty to file
5 further affidavits within two weeks of today's date, that the applicants have liberty to
6 file legal submissions, that's yourselves?

7 MR WATERS: Yes, yes, Judge.

8 JUDGE: And the applicants have liability to obtain the transcript, okay, very good,
9 I've already dealt with that, and I think those were the orders which were made by
10 Ms Justice Murphy. So in terms of compliance with those orders, what is the current
11 position?

12 MR WATERS: Well, I don't know, Judge, I am not in a position -- nobody has
13 informed me about the position of the other side at all, I haven't heard from them.

14 JUDGE: All right, very good. Well, maybe Mr McCann will tell us what's
15 happening?

16 MR McCANN: Thank you, Judge, and thank you Mr Waters. Judge, at the outset,
17 the Attorney General has asked me -- has asked me to ensure the Court is apprised
18 of a number of public speeches which were made by the applicants at the conclusion
19 of the hearing of the 21st of April 2020 in the Round Hall, the Four Courts. And in
20 this respect, I propose handing in a transcript of the remarks made by Mr Waters and
21 Ms O'Doherty on that occasion.

22 JUDGE: Yes.

23 MR McCANN: Together with correspondence with the Chief State Solicitor's
24 office.

25 MS O'DOHERTY: This is another delay tactic.

26 JUDGE: Now, now, just hold on now, we --

27 MS O'DOHERTY: We have a right to free speech, you've taken enough of our
28 speeches -- of our rights away from us.

29 JUDGE: Ms O'Doherty, Ms O'Doherty, please, Ms O'Doherty, would you please
30 don't interrupt, you will get your opportunity to respond in a moment.

31 MR McCANN: So Judge, if I just might say in relation to that, the Attorney General
32 thought it important in his role as guardian of the Constitution that that information
33 should be put before the courts.

34 JUDGE: Yes, all right.

1 MR McCANN: But I've no application to make at this time in respect of it.

2 JUDGE: All right, very good.

3 MR McCANN: Judge, the -- Ms Justice Murphy gave the respondents -- sorry the
4 intended respondents, my clients, until next Monday to file replying affidavits.

5 JUDGE: Yes.

6 MR McCANN: And if it is -- if they decide to do so, they will endeavour to do so by
7 close of business this Friday.

8 JUDGE: Okay.

9 MR McCANN: But in any event, by close of business on Monday the 5th, Judge.

10 JUDGE: You see, there is no business on Monday, that's one of the issues, because
11 isn't Monday a bank holiday?

12 MR McCANN: Yes, well we will deliver it before.

13 JUDGE: Right.

14 MR McCANN: If there is going to be an affidavit, Judge, and in the worst case
15 scenario it'll be delivered -- it'll be delivered by 5 pm on Monday the 5th.

16 JUDGE: Yes, all right.

17 MR McCANN: But the State as it presently stands, expects to be in a position to
18 deliver the affidavit this Friday.

19 JUDGE: Okay.

20 MR McCANN: That's that. Judge, just in that respect, the Department did ask me to
21 indicate what priority was given going to this matter. So I just might explain to the
22 Court that the Department of Health is giving these proceedings due priority. The
23 Court will appreciate that the Department is in the midst of a public health
24 emergency and a number of competing priorities -- and it has a number of competing
25 priorities to address. The challenge for the Department includes the fact that some of
26 the persons with the relevant expertise and knowledge in the Department for these
27 proceedings are also tasked with the ongoing public health response of the National
28 Public Health Emergency Team and framing what is to follow the expiry of the
29 current period prescribed for movement restriction on the 5th of May 2020,
30 coincidentally the date of the leave application. However, the Department has
31 committed to furnishing appropriate and timely instructions for this case. And then
32 following on from that, Judge, the -- Ms Justice Murphy gave the applicants liberty
33 to file legal submissions.

34 JUDGE: Yes.

1 MR McCANN: I understand that they indicated they weren't intending to do that,
2 before Ms Justice Murphy.

3 JUDGE: Yes.

4 MR McCANN: And even though they were given until the 24th of April, they don't
5 appear to have done so. And again, in that respect, I think that it would be helpful
6 for the Court to have short legal submissions, outline legal submissions from the
7 respondents, the intended respondents.

8 JUDGE: Yes.

9 MR McCANN: And again, we will endeavour to have those by this Friday, or in the
10 worst case on Monday, Judge.

11 JUDGE: Okay, right, right.

12 MR McCANN: And that's all I have to say.

13 JUDGE: Very good, thank you.

14 MR KIERAN: May it please the Court, Judge, from my perspective.

15 JUDGE: Yes.

16 MR KIERAN: I'm in a very similar position to Mr McCann in terms of time line.
17 So the notice parties will endeavour to file any affidavit by this Friday, but certainly
18 no later than 5 pm on Monday. Written submissions again may assist the Court on
19 the justiciability issues arising, and again we can deliver those by no later than 5 pm
20 on Monday. I would ask, Judge, perhaps that the affidavit stamped and filed and
21 submissions be e-mailed both to the Court and to the applicants, and all parties if
22 that's -- I think that would assist. And then finally, Judge, just on a minor point, I
23 think the Court when reciting the order of Ms Justice Murphy referred to the
24 Cathaoirleach of the Seanad. The copy of the order I've seen --

25 JUDGE: No, sorry, that actually was my addition, it's not in the order.

26 MR KIERAN: Not at all, Judge.

27 JUDGE: But I assumed that would be the person who would represent the Seanad.

28 MR KIERAN: I think the appearance would be by Seanad Éireann, which has been
29 --

30 JUDGE: I see, all right, very good.

31 MR KIERAN: May it please the Court, thank you, Judge.

32 JUDGE: But in any event, am I correct in thinking that the houses of the Oireachtas,
33 if I can call them collectively, are going to be represented by, did you say the
34 commissioner?

1 MR KIERAN: Judge, the house of the Oireachtas commission has functions in that
2 regard.

3 JUDGE: Yes.

4 MR KIERAN: But I am appearing for all three entities instructed by the office of
5 parliamentary legal advisers, Judge.

6 JUDGE: All right. So there'll be effectively one representative appearing for the
7 Dáil and the Seanad?

8 MR KIERAN: Precisely, Judge.

9 JUDGE: All right, very good, thanks. Now, Mr Waters, you've heard the position
10 that effectively by Friday and if not by Monday you will have a replying affidavit
11 and also legal submissions on behalf of the respondents.

12 MR WATERS: Yes, Judge.

13 JUDGE: Okay. Now, the obvious question arises and this is a matter of practice, it's
14 not a matter of delay, and that is this matter is listed for hearing on Tuesday. Now,
15 given the unfortunate circumstances, there is a considerable amount of latitude in
16 court time for hearing the matter, and before I deal with a number of other matters, it
17 does seem to me that it might make a lot of sense and be in your convenience and
18 also the convenience of the other parties if the matter didn't proceed on Tuesday, but
19 maybe proceeded on Wednesday or Thursday. It would give you an opportunity to
20 consider the matters, which are going to be in the grounding -- in the replying
21 affidavits and the legal submissions.

22 MR WATERS: Excuse me, Judge.

23 MS O'DOHERTY: All we're asking -- do you mind if I speak, I know you like --
24 rather for Mr Waters to address the Court rather than me, you've made that very
25 clear. All we are asking from you, Judge, is that you give us leave for a judicial
26 review.

27 JUDGE: Yes.

28 MS O'DOHERTY: That's all we are -- we do not want the substantive issue to be
29 heard in this court in front of you.

30 JUDGE: Yes, yes.

31 MS O'DOHERTY: Or Judge Murphy, it is quite clear, we have laid out our case, the
32 people of Ireland are under mass house arrest, the gardaí are going around the --

33 JUDGE: Ms O'Doherty, again, please you know, you've made a good point there on
34 --

1 MS O'DOHERTY: We -- all we are asking, the issue --

2 JUDGE: -- excuse me, but please do not -- please don't be drifting into speeches.

3 MS O'DOHERTY: Excuse me, how -- this is the way that I speak, I'm sorry if you
4 don't like it. The State has now resorted to using guns to threaten our people, this is
5 what the State is doing now. The gardaí are now armed in train stations, this is
6 unthinkable in our Republic, that is how frightening they are.

7 JUDGE: Ms O'Doherty, Ms O'Doherty, this --

8 MS O'DOHERTY: This is a matter of extreme urgency, if the State are acting in --

9 JUDGE: What you've just referred to doesn't actually have direct relevance to the
10 leave point.

11 MS O'DOHERTY: It has every bearing, the public --

12 JUDGE: And I want you to listen to what I'm going to say on the leave point,
13 because I think it's important, and that is you want leave to bring these judicial
14 review proceedings.

15 MS O'DOHERTY: Correct, we're here nearly three weeks.

16 JUDGE: Very good. Now, you will know because I'm sure you've looked into the
17 matter, that for a court to grant leave, the court has to be satisfied that you have an
18 arguable case, all right. Now, you undoubtedly think you have an arguable case, but
19 the notice party and the respondents think you don't have an arguable case. So there
20 is going to be an issue as to whether or not you do have an arguable case --

21 MS O'DOHERTY: It is up to you to decide if there is an --

22 JUDGE: That's absolutely right.

23 MS O'DOHERTY: That's why we applied on an ex parte basis.

24 JUDGE: Sorry, could you just let me finish and maybe I'll answer what you're about
25 to say. And there are legal authorities on what is or is not an arguable case, all right,
26 not every case is arguable, I'm sure you fully appreciate that. And the State are
27 saying, well look you brought these judicial review proceedings, in our view they're
28 not arguable. And you're saying, well they're so arguable that it's so obvious that
29 there doesn't really need to be a hearing at all. But unfortunately there has to be
30 a hearing on the matter.

31 MS O'DOHERTY: That's not true.

32 JUDGE: Well, unfortunately it is, it is, it is correct. Now, what I --

33 MS O'DOHERTY: There does not have to be a hearing, this is an ex parte matter,
34 we asked --

1 JUDGE: Yes, but even on an ex parte application, you still have to satisfy the court
2 it's an arguable case, in the situation pertaining in this --

3 MS O'DOHERTY: And I am telling you, Judge --

4 JUDGE: Excuse me, could you please --

5 MS O'DOHERTY: -- that An Garda Síochána are threatening our citizens, law
6 abiding with guns.

7 JUDGE: Please, please don't, I'd really prefer if you didn't talk across me.

8 MS O'DOHERTY: Are we -- do we have an armed police force all of a sudden?
9 The State is using guns.

10 JUDGE: And the leave application was --

11 MS O'DOHERTY: Guns, do you hear what I'm saying? I can show you a picture if
12 you want?

13 JUDGE: Excuse me, excuse me, excuse me, the leave -- excuse me, could you
14 possibly just concentrate on just what I'm saying just for one moment? The leave
15 application was put on notice to the State, the State are saying you do not have an
16 arguable case. So that's the -- that is the issue which I would have --

17 MS O'DOHERTY: Of course the State would say that, we are asking you do we
18 have an arguable case, it is for you to decide.

19 JUDGE: I -- yes, and you have to -- and you have to persuade --

20 MS O'DOHERTY: And pass it on then to your colleague.

21 JUDGE: Excuse me, could you just listen to -- could you just listen to me for just
22 one moment? You have to persuade the Court that you do have an arguable case, in
23 the teeth of submissions from the State to the effect that you don't have an arguable
24 case, okay.

25 MS O'DOHERTY: Sorry, we have to persuade the Court.

26 JUDGE: All right, now I can't actually put that matter any --

27 MS O'DOHERTY: And you know that, it's a kangaroo court.

28 JUDGE: -- I can't put that -- excuse me, I really can't --

29 MS O'DOHERTY: It's a kangaroo court.

30 JUDGE: -- I can't put that matter any much further, and that actually brings me to
31 the next matter, which I really would like you to concentrate on. There are a number
32 of issues in this matter, okay. The first issue is as to whether or not you have an
33 arguable case for the Court to grant you leave to seek judicial review. There are
34 a number of legal authorities on what is or is not an arguable case. So I'd like you to

1 look at those authorities and -- because the Court obviously has to act on the law
2 which includes authorities, and persuade the Court that you do have an arguable
3 case, okay.

4 MS O'DOHERTY: Well, we have certainly done that, Judge.

5 JUDGE: Very good. Now, the next matter which I also believe and it also feeds into
6 whether or not you have an arguable case is that I have read your grounds and they
7 are very detailed and they're very comprehensive and you cite various articles of the
8 Constitution in support of your claim. And you will know from the reading of those
9 Articles that not all those articles are absolute, you will see words like, "Save in
10 accordance with law", or "As far as practicable", okay. So you are going to, I would
11 suggest, have to be in a position to point out to the Court that what you say are
12 infringement of these various articles fall outside what is permissible by law. Now,
13 that's a long way of saying that I think you should, though you don't have to if you
14 don't want to, I think you should yourselves produce legal submissions on that point
15 as well. Now, so Ms Justice Murphy gave you an opportunity to file legal
16 submissions, I'm going to give you another opportunity to file legal submissions,
17 should you so wish, you don't have to. But I really would like you to understand that
18 from the Court's point of view, simply stating you have an arguable case doesn't
19 mean it's arguable.

20 MS O'DOHERTY: We have outlined all of the articles of Bunreacht na hÉireann
21 that are being breached by the State.

22 JUDGE: Yes, and I've --

23 MS O'DOHERTY: The latest one is that they're using guns against the Irish people
24 to frighten them.

25 JUDGE: And Ms O'Doherty --

26 MS O'DOHERTY: On the phony claim that they're concerned for their health.

27 JUDGE: Ms O'Doherty, I have read your -- I have read your grounds and I've read --

28 MS O'DOHERTY: But I can speak over you, Judge, this -- you have a right to hear
29 our side --

30 JUDGE: Just one moment, just one moment, I have read your --

31 MS O'DOHERTY: You need to treat both sides with fairness, Judge, if you're going
32 to fulfil your duties.

33 JUDGE: Yes, well --

34 MS O'DOHERTY: So can I please speak?

1 JUDGE: Yes.

2 MS O'DOHERTY: We have made out many articles of this Constitution.

3 JUDGE: Yes.

4 MS O'DOHERTY: Which the State is breaching every single day, the latest of
5 which we have not been able to put into our submissions, but we will add it.

6 JUDGE: Okay.

7 MS O'DOHERTY: That the State and I repeat yet again --

8 JUDGE: Yes.

9 MS O'DOHERTY: -- are now threatening our citizens using guns.

10 JUDGE: Yes. You see, Ms O'Doherty, Ms O'Doherty --

11 MS O'DOHERTY: This is an outrage, you should automatically grant us leave to
12 appeal -- leave to judicial review.

13 JUDGE: No, this -- Ms O'Doherty, the --

14 MS O'DOHERTY: You should automatically.

15 JUDGE: Ms O'Doherty, the problem is in ordinary language is the State and the
16 notice party don't agree with you, so you have to persuade the Court that you are
17 right and they are wrong.

18 MS O'DOHERTY: And what about the Court?

19 JUDGE: So in pursuance of that, I am suggesting but not directing that you file legal
20 submissions.

21 MR WATERS: Sorry, excuse me, Judge, can you just clarify this point for us,
22 because it seems that whereas I agree that obviously these matters will need to be
23 tested.

24 JUDGE: Yes.

25 MR WATERS: It would seem to me obvious that they would be tested in the course
26 of a full hearing, leave having been granted on the low threshold, on the basis of the
27 low threshold which is said to exist in these matters.

28 JUDGE: Yes.

29 MR WATERS: And really it is a matter of, for example, the mere fact that the
30 Constitution already provides for emergencies to be declared in only a limited set of
31 circumstances, and that requirement of Article 28 is not at all met by the presence
32 circumstances.

33 JUDGE: Yes.

34 MR WATERS: That of itself it seems is prima facie substantiation for the assertion

1 that this entire package is outside the scope of the Constitution and utterly repugnant
2 to it.

3 JUDGE: Yes, I appreciate that submission, but again it's a submission which is not,
4 I assume, is not accepted by the State or the notice parties. So therefore there is an
5 issue, and you're absolutely right, the threshold is low. But notwithstanding that it is
6 a threshold and it has to be got over, and there are legal authorities as to what is or is
7 not, arguable, and that's something you are going to have to address at the hearing of
8 this matter. And it seems to me, though you don't have to do it if you don't want to,
9 that to assist you and assist the Court, you might provide legal submissions as to why
10 you say you clearly get over that threshold and the matter is clearly arguable. And
11 that the various legal authorities which decide what is, or is not, arguable are on your
12 side. Now, it's a matter for yourself whether you wish to do it.

13 MR WATERS: Yes, we don't have an issue with justifying our position in any
14 respect whatever. What we have an issue with is the idea that this should happen
15 prior to a full hearing of these matters.

16 JUDGE: Well, you see Mr Waters, I'm sure you're aware because you've obviously
17 looked at the rules, because I see you've correctly identified Order 84 in your
18 grounds. And Order 84 Rule 24(1) specifically provides that on an application for
19 leave for judicial review the court can direct that the leave be on notice to the
20 respondent and that's what's happened here.

21 MR WATERS: I appreciate that, Judge.

22 JUDGE: Okay.

23 MR WATERS: But I do fear that what's actually going to happen here is that the
24 other -- the various parties on the other side are going to seek to bog this down for
25 a very long time.

26 JUDGE: Yes.

27 MR WATERS: And this issue as I say repeatedly and I don't want to repeat myself,
28 but as you well know, Judge, you I think were concurring with me that it is a most
29 grave and urgent matter that's facing this country.

30 JUDGE: Yes.

31 MR WATERS: Possibly unprecedented in our history and for that reason, I think
32 that we need to show history and the people of Ireland that this is at last being dealt
33 with, that these irregularities which occurred to an entire process of the Oireachtas,
34 the president -- the president's responsibility, the media, the failure of anybody to

1 come out from the legal profession or any expert of that kind, unlike in our
2 jurisdictions where there have been very strong voices in defence of the rule of law,
3 nothing like that here. It is left to two private citizens --

4 JUDGE: Yes.

5 MR WATERS: -- to take up this responsibility at great personal risk and with
6 encountering huge intimidation and abuse from the public and the authorities.

7 JUDGE: Yes.

8 MR WATERS: And so we feel that you know, this is something that really cannot
9 be allowed to be bogged down in extraneous matters. Now, I appreciate, Judge, and
10 I would want to just speak to you about this matter, that our affidavit or sorry, our
11 statement of grounds is a long and complex document.

12 JUDGE: Yes.

13 MR WATERS: However, I will say to you this, that whereas we wished at the outset
14 to set out all of the possible grounds that we might have in respect of seeking leave
15 in this matter.

16 JUDGE: Yes.

17 MR WATERS: It is not necessarily our intention that we would have this approach
18 to the actual proceedings themselves. I would see that we would seek to focus our
19 case on particular aspects.

20 JUDGE: Yes, yes.

21 MR WATERS: And I think because it is of the absolute utmost urgency that this
22 matter happens quickly, and that was for that reason that we chose to take the route
23 of --

24 JUDGE: Sorry for interrupting you Mr Waters, are you in effect saying look, the
25 grounds I think run to some 30 odd pages.

26 MR WATERS: Yes.

27 JUDGE: And I appreciate the first number of pages deal with the chronology of
28 events. But are you in effect saying, look we have contested this legislation and the
29 regulations made on numerous grounds. But some -- some grounds are basically
30 more important or better than others, is that what you're saying?

31 MR WATERS: Indeed, indeed, yes.

32 JUDGE: Well, now wouldn't it be terribly helpful if you could actually identify to
33 the Court what grounds you think are the important grounds?

34 MR WATERS: Well, you see, this is again our difficulty, Judge, that you see in

1 order to get leave, we wish to give a full account of our objections.

2 JUDGE: Yes.

3 MR WATERS: And it is -- I would be greatly afraid that were we to withdraw any
4 of those objections this time, this could be used as a pretext to knock us off the horse
5 and prevent us to proceeding to the --

6 JUDGE: No, I don't think anybody is suggesting withdraw, but it frequently happens
7 and I'm sure you are familiar with reporting on court cases over the years, that
8 lawyers make five or six points, but in truth there are only really two or three of them
9 that they are really concentrating on. Now, if that's the case here, you know it might
10 be best, but it's a matter again for yourself, to identify those points, so that the matter
11 can proceed with expedition.

12 MR WATERS: I think that again if you understand the distinction, that at the point
13 of a full hearing, having obtained leave, we would feel more comfortable with doing
14 that.

15 JUDGE: Right.

16 MR WATERS: As opposed to at this preliminary stage were to actually interfere
17 with the broad grounds we have submitted.

18 JUDGE: Yes.

19 MR WATERS: To dilute them in any way might run the risk of --

20 JUDGE: Well, you know that's -- in a sense that's a call you have to make
21 yourselves.

22 MR WATERS: Yes, I understand that.

23 MS O'DOHERTY: Well, Judge, sorry, John, if you don't mind? There are so many
24 fundamental rights, Judge, that are being breached by the State in relation to this.

25 You ask us to pluck out one or two that may be --

26 JUDGE: No, I haven't asked you to do anything, it was Mr Waters seemed to be
27 suggesting that some are more important, it certainly wasn't me.

28 MS O'DOHERTY: Oh right, okay. But we -- I feel in regard to this that some rights
29 are more important to some citizens such as the right to religious practice which is
30 being denied and which is a fundamental right outlined in our Constitution.

31 JUDGE: Yes.

32 MS O'DOHERTY: Our children are being denied the right to their education, our --
33 their parents are being denied the right to earn their living, the country is going to be
34 brought back to probably a hundred, probably a hundred years in terms of the crash

1 that is going to follow and all of you here are going to be effected, you're going to be
2 the most effected in fact because the professional class will be the ones who will be
3 paying for the next bail out. I'm not going to make a speech but these are just the
4 facts.

5 JUDGE: Yes.

6 MS O'DOHERTY: People have a right to health care, there are people outside there
7 today in that crowd who tried to get health care, normal health care which they can
8 no longer get because it's only Covid 19 that -- consultants of this country are now
9 up in arms as well.

10 JUDGE: I don't think anybody would doubt whatsoever that the Covid crisis has
11 upended society and what used to be certainties are no longer certain, I don't think
12 there's any disagreement in that. But that's not what we're discussing today.

13 MS O'DOHERTY: Well, it is, Judge, it is.

14 JUDGE: I think --

15 MS O'DOHERTY: That's why you should immediately give us leave to --

16 JUDGE: No, there's no -- sorry, sorry, I have to -- you know, you quoted the
17 Constitution at me --

18 MS O'DOHERTY: -- have this heard in a judicial review.

19 JUDGE: -- correctly, but you will of course see that I have to act in accordance with
20 law and the law provides that for me to give leave, you have to establish an arguable
21 case and the State says you don't have an arguable case.

22 MS O'DOHERTY: And the Constitution of Ireland lays down the laws.

23 JUDGE: Now, maybe -- maybe at this stage it might be best --

24 MS O'DOHERTY: And the laws are given to us by God not by you.

25 JUDGE: Yes, all right. Now, maybe at this stage --

26 MS O'DOHERTY: So Judge, honestly you need to just grant, urgently grant us
27 leave. This is going --

28 JUDGE: Do you think at this stage we might address your concerns which are that
29 you're concerned that your application is going to be bogged down?

30 MS O'DOHERTY: Well, by now this is our third appearance in front of a court.

31 JUDGE: Right. Now, what I --

32 MS O'DOHERTY: We should have been granted leave weeks ago.

33 JUDGE: -- what I have suggested to you and I would like you just to -- it's a very
34 simple suggestion, it's a practical suggestion and it's simply this, that rather than

1 proceeding with this matter on Tuesday, that the matter proceed on Thursday or
2 Wednesday, but I think Thursday might be more sensible, given the fact that Monday
3 is a bank holiday and also you may well want an opportunity to consider what is in
4 the State's legal submissions and also what's in the replying affidavits. Now, do you
5 want that opportunity?

6 MS O'DOHERTY: Like, it's like -- it's as if you -- it's as if you're not hearing what
7 we're saying.

8 JUDGE: It's a -- it's a simple, it's a simple issue which I now want to address,
9 because --

10 MS O'DOHERTY: We are not going to hear --

11 JUDGE: Well, could I just ask you a simple question --

12 MS O'DOHERTY: -- the case, the substantive issue before this court.

13 JUDGE: Would it be in your -- excuse me, would it be to your benefit rather than
14 proceeding with this matter on Tuesday to proceed with this matter say next
15 Thursday because given that Monday is a bank holiday, it affords you an additional
16 time to consider what the State are saying by way of the fact that they are
17 presumably going to say you don't have an arguable case. Now, do you want that or
18 don't you?

19 MS O'DOHERTY: The State doesn't have an arguable case, that's why they want to
20 buy more and more time.

21 JUDGE: All right, okay.

22 MS O'DOHERTY: The State's case is built on a hill of beans, the State separately to
23 this refuses to answer our question about the registration of deaths --

24 JUDGE: Sorry, do you want -- do you want that opportunity, I mean it seems to me
25 it makes a lot of sense, but it's a matter entirely for yourself.

26 MS O'DOHERTY: -- because they're lying about the registration of deaths.

27 JUDGE: All right, okay.

28 MS O'DOHERTY: They're lying and all around the world now this is being
29 exposed.

30 JUDGE: Ms O'Doherty, Ms O'Doherty, can I take it --

31 MS O'DOHERTY: And if you listen to me, Judge, I am saying to you that you need
32 to urgently --

33 JUDGE: Ms O'Doherty, I'm actually dealing -- I'm dealing -- I'm dealing -- I'm not
34 -- excuse me, Ms O'Doherty, please just one moment?

1 MS O'DOHERTY: If you were to listen to the words I'm saying.

2 JUDGE: Ms O'Doherty, I am dealing with a practical matter as to whether or not
3 you wish this matter to proceed next Tuesday, or whether or not you would wish
4 a further day or two to consider what is going to be in the replying affidavits and the
5 State submissions. If you don't want an additional time, that's absolutely fine and the
6 matter will proceed next Tuesday. So maybe --

7 MS O'DOHERTY: Right. Well, what we actually want is for you just to do your job
8 and grant us leave, that's what we want.

9 JUDGE: Well, could you just -- maybe you'd like to discuss that with Mr Waters for
10 a moment --

11 MS O'DOHERTY: And for you to -- and for you to up hold the Constitution, that's
12 what we want.

13 JUDGE: Could you just, could you just discuss that with Mr Waters for a moment?
14 Mr Waters, you might like just to consider that, I think it would make sense, but it's
15 a matter entirely for yourself.

16 MR WATERS: Well, if we can be --

17 MS O'DOHERTY: I mean they turned this --

18 MR WATERS: -- if we can be guaranteed, Judge, that the papers will arrive by 5
19 o'clock on Friday evening.

20 JUDGE: Yes.

21 MR WATERS: We would wish to go ahead on Tuesday morning.

22 JUDGE: All right, very good.

23 MR McCANN: Well, I can't guarantee, I'll endeavour to do that, but I can't
24 guarantee that.

25 JUDGE: All right, and supposing there's slippage in that and you don't get them
26 until Monday evening at 5 o'clock?

27 MR WATERS: Well, then we would agree to Wednesday, but that would be the
28 very latest.

29 JUDGE: All right, okay. Well, look we'll proceed then on the basis that the matter
30 is proceeding next Tuesday and that the papers, as Mr McCann has pointed out and
31 counsel for the notice party, that --

32 MR WATERS: But again, Judge, we would -- I beg your pardon.

33 JUDGE: -- that they will be delivered on or before close of business on Friday.

34 MR WATERS: Thank you very much, Judge. But I would again stress and I know

1 this is labouring the point perhaps, but the urgency of this really has to be primary,
2 I submit.

3 JUDGE: I fully understand the urgency of the matter Mr Waters, and you've set that
4 out very very clearly in your statement of grounds. Now, there are a number of
5 matters I'd like you to attend to if you wouldn't mind?

6 MR WATERS: Certainly, Judge.

7 JUDGE: Firstly, have you actually filed an affidavit in support of your application?

8 MR WATERS: Only the -- an affidavit of verification only.

9 JUDGE: I see.

10 MR WATERS: We haven't submitted full personal affidavits as yet.

11 JUDGE: All right, I think the rules require an affidavit, it seems to me it might be
12 appropriate for you to set out the facts in an affidavit and if you could have that
13 delivered on or before Friday?

14 MR WATERS: Yes, Judge.

15 JUDGE: That's the first thing. The second matter which I'd also like you to do and
16 I've read through your grounds, and at the end of every grounds you always set out
17 what release or what orders you're seeking from the Court.

18 MR WATERS: Yes, Judge.

19 JUDGE: I don't think, I'm subject to correction, I don't think that's actually in your
20 grounds, what exactly you're seeking. So could you possibly set that out?

21 MR WATERS: Well, we're seeking an order of certiorari.

22 JUDGE: Fine, that's fine, well could you just write that down?

23 MS O'DOHERTY: It's at the beginning, Judge.

24 MR WATERS: It is at the very outset.

25 JUDGE: Is it, okay, well maybe if you could just possibly put it -- a separate
26 document with that it would be very very helpful.

27 MR WATERS: Okay, we can do that in our own affidavit then?

28 JUDGE: Certainly, if you wish, yes.

29 MR WATERS: Yes.

30 JUDGE: That's absolutely fine, and then the further matter is, and again it's a matter
31 for yourself, but I know you don't agree with me as to the issue as to what is or is not
32 arguable, but there is an issue there. There are also issues on the various articles of
33 the Constitution, because I know you're familiar with the Constitution and I know
34 you'd be familiar with the fact that as I've mentioned already, a lot of articles refer to

1 given rights, but save in accordance with law.

2 MR WATERS: Yes.

3 JUDGE: Or given rights as far as practicable, that's an issue you might want to
4 consider and again, again I'm not going to direct you to do so, but I think it would
5 make an awful lot of sense from your own point of view, that if you deliver legal
6 submissions and had those also delivered on or before Friday?

7 MR WATERS: Very well, Judge, yes.

8 JUDGE: Okay. So subject -- is there anything else now outstanding for this matter
9 then to proceed next Tuesday?

10 MR McCANN: No, Judge.

11 JUDGE: All right, very good.

12 MR WATERS: Thank you, Judge.

13 JUDGE: So subject to that then, I will adjourn the matter then to -- for hearing next
14 Tuesday, that's Tuesday the 5th, is it?

15 MR WATERS: The 5th of May, yes, Judge.

16 JUDGE: The 5th of May, very good, okay.

17 MR WATERS: Thank you, Judge.

18 JUDGE: Thank you very much, and I'll reserve any issue as to costs, thank you.

19

20 Court adjourned

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