

Record No: 2020 271 JR

THE HIGH COURT
BEFORE THE HONOURABLE MR JUSTICE CHARLES MEENAN

5 May 2020

GEMMA O'DOHERTY & JOHN WATERS

v.

THE MINISTER FOR HEALTH IRELAND & ORS

Counsel for the Applicant:	Mr J Waters, Lay Litigant Ms G O'Doherty, Lay Litigant
Counsel for the Respondent:	Mr P McCann, SC Mr G Meehan, BL Mr E Carolan, BL
Counsel for the Notice Parties:	Mr F Kieran, BL

Gemma O'Doherty & John Waters v. The Minister for Health Ireland & ors
5 May 2020

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1 REGISTRAR: Morning, Judge.

2 JUDGE: Morning.

3 REGISTRAR: Record No. 2020 271 JR, Gemma O'Doherty and John Waters,
4 applicants, v. Minister for Health Ireland and Attorney General, respondent.

5 JUDGE: Yes. Morning.

6 MR McCANN: Morning, Judge.

7 MR WATERS: Morning, Judge.

8 JUDGE: Now, Mr Waters?

9 MR WATERS: Good morning, Judge.

10 MR McCANN: I have a housekeeping point I want to make early on, Judge.

11 MR WATERS: Do you wish to go ahead now?

12 JUDGE: Well, do you want to make it now or --

13 MR McCANN: Yes.

14 JUDGE: Very good. Yes.

15 MR McCANN: So, Judge, as I told you on the last occasion I appear with -- I appear
16 for the intended respondents.

17 JUDGE: Yes.

18 MR McCANN: But I think I am going to call them, because I will do it anyhow by
19 accident, I'm going to call them the respondents.

20 JUDGE: Yes.

21 MR McCANN: And I appear with Gerard Meehan BL and Eoin Carolan BL and
22 I am attended by Helen Maguire from the CSSO. I told you that on the last occasion.

23 JUDGE: Yes.

24 MR McCANN: Now, Judge, you -- the respondents had until yesterday to deliver
25 submissions and an affidavit in this matter and the submissions were in fact delivered
26 on Friday, Judge, and the affidavit was delivered on Sunday --

27 JUDGE: Yes.

28 MR McCANN: -- to the applicants. Now, you will recall in your discussions with
29 the applicants last week that, to my recollection, you directed the applicants that if
30 they were to put in an affidavit or submissions that they were to do so by close of
31 business last Friday, that's my recollection. Now, I have been served with them. The
32 respondents have been served with a lengthy affidavit this morning.

33 JUDGE: Yes.

34 MR McCANN: The version I have is not sworn. That's the first point I'd make,

1 Judge, so I don't know whether or not there's a sworn affidavit or not.

2 JUDGE: Yes. Thank you.

3 MR McCANN: That's the first point.

4 MS O'DOHERTY: Here it is.

5 JUDGE: Yes, all right.

6 MR McCANN: The second point I'd make, Judge - you might give it to my solicitor
7 please - the second point I make, Judge, is that I didn't, I personally didn't, see this
8 affidavit until I had left for court.

9 JUDGE: Yes.

10 MR McCANN: And I haven't had time to consider it and I want time to consider it
11 and to take instructions on it if necessary.

12 JUDGE: Yes. Thank you, Mr Cahill. Yes, Mr Waters.

13 MR WATERS: Judge, if I can just respond briefly to that. My understanding of the
14 situation was that the respondents were to file their documents by Friday evening but
15 we did receive documents on Friday evening.

16 JUDGE: Yes.

17 MR WATERS: We also, as it turned out, received I think the -- it seemed like the
18 entire contents of the files of the Department of Health on Sunday evening between
19 the hours, via email, between the hours of six pm and 9.30 pm. So, they didn't
20 actually meet that requirement.

21 JUDGE: Yes.

22 MR WATERS: The understanding therefore was in fact that this hearing should be
23 postponed until Wednesday but we were prepared to go ahead in any event, despite
24 their failure to meet that requirement.

25 JUDGE: Yes.

26 MR WATERS: I think that's my recollection of your instruction, Judge.

27 JUDGE: Well --

28 MR WATERS: But nevertheless I have no issue with this at all except that there is
29 an enormous amount of material, literally truckloads of paper.

30 JUDGE: There is, yes.

31 MR WATERS: At the very last moment, beyond the last moment indeed.

32 JUDGE: And I think we have to take a practical view point of this. You have served
33 an affidavit which of course you are fully entitled to do. I note it's not sworn.

34 MR WATERS: It is sworn.

1 MS O'DOHERTY: It is sworn.

2 JUDGE: Mm? Well, the one I have isn't. And the respondents are -- and the notice
3 party are obviously entitled to an opportunity to see what's in the affidavit and to
4 consider the matter and equally, as I have read the submissions, as I have read your --
5 sorry, I have your sworn copy now. Thank you. As I have read your submissions,
6 and I have also read the submissions of both parties, and also the affidavit, it's
7 probably no harm if I have an opportunity to look at this affidavit as well. So, I am
8 not going to proceed with the matter until the parties are ready to do so. So, really it
9 amounts to this, Mr McCann, have you any idea as to how long you might need to
10 consider the contents of this affidavit?

11 MR McCANN: Until lunchtime, Judge.

12 MS O'DOHERTY: Judge --

13 MR WATERS: Sorry, Judge, this -- I again reiterate this application was made three
14 weeks ago and it was made ex parte.

15 JUDGE: Yes.

16 MR WATERS: And it seems to me that looking at the documentation we are
17 receiving that the State is really seeking to hold us here at the outside gate of these
18 matters.

19 JUDGE: Yes.

20 MR WATERS: Meanwhile the crisis facing our country is escalating by the day.
21 We are heading towards a crisis --

22 JUDGE: Well, I suppose that begs the question, Mr Waters, why did you only
23 deliver this affidavit this morning?

24 MR WATERS: Because the papers we got did not come till the very last moment.

25 JUDGE: I see.

26 MR WATERS: And it is very difficult to get anything photocopied in this town,
27 never mind stamped.

28 JUDGE: Okay.

29 MR WATERS: Over the weekend or at all.

30 JUDGE: Mr Waters, as you have told me on numerous occasions this is a very
31 important matter, I am not going to embark on this matter until the parties are ready
32 to deal with it. You have served a lengthy affidavit this morning, as I understand it --

33 MS O'DOHERTY: Judge, sorry --

34 JUDGE: No, no, no. Just hold on for one moment.

1 MS O'DOHERTY: Judge, this is the statement of grounds which you asked us to
2 swear. The State has had this for three weeks. This is the document --

3 JUDGE: So, are you in fact telling me that all that's in this affidavit is a statement of
4 grounds in affidavit form?

5 MS O'DOHERTY: We have presented our statement --

6 JUDGE: Is that what you are saying to me?

7 MS O'DOHERTY: We presented our statement of grounds almost four weeks ago,
8 three weeks ago.

9 JUDGE: Yes.

10 MS O'DOHERTY: With an affidavit of verification. We were told that that was
11 sufficient for the Court. Then when we appeared before you last week you said that
12 it needed to be sworn. That is what we have done, Judge. There is no difference in
13 the content as far as -- is there?

14 MR WATERS: Very little insofar as we felt it was respectful to the Court we
15 fulfilled the certain requirement to give personal experience in relation to this matter,
16 although it is our understanding, based on Crotty v. An Taoiseach, that that actually
17 is not necessary.

18 JUDGE: Right.

19 MR WATERS: And that we have standing for this case at the very beginning by
20 virtue of being citizens --

21 JUDGE: Well, that's all obviously something that's going to have to be considered.

22 MR WATERS: -- who suffer from the consequences of -- I beg your pardon, Judge.

23 JUDGE: Anyway, look, the long and the short of it is I am not going to embark on
24 this hearing until the parties are ready to do so and there's an application before me,
25 to which I propose to accede to, to put this matter back until 2 o'clock. Okay. So,
26 we will say 2 o'clock.

27 MR WATERS: Okay, Judge.

28 MS O'DOHERTY: Judge, could I ask you also, a guarantee that was made to us at
29 the beginning of this three weeks ago was that due to the fact that the public are
30 being denied access to the courts and that is a breach of Article 34 of Bunreacht na
31 hÉireann at the very least we were guaranteed that the DAR would be given to us. It
32 was not given to us. We wrote to the High Court office last week requesting the
33 DAR and no reply, no reply.

34 JUDGE: All right.

1 MS O'DOHERTY: So that is another breach of this whole process.

2 JUDGE: Very good. Well, I will discuss with Mr Manning to enable the provision
3 of the DAR, okay. All right.

4 MR WATERS: And, Judge, one more thing, before perhaps we adjourn, it may be
5 suitable for beginning at 2 o'clock but nevertheless I have to raise it again the fact
6 that the courts have been closed to the public. This is continuous --

7 JUDGE: Ah well, Mr Waters, you have made that application, I have ruled on that
8 application.

9 MR WATERS: But I feel -- I mean we are here really, in a certain sense, under
10 duress by virtue of the urgency of this matter but we feel profoundly that this is an
11 unconstitutional situation.

12 JUDGE: No, you have told me that before but I have found that it is constitutional.

13 MR KIERAN: Judge, in terms of the notice parties --

14 JUDGE: Yes, Mr Kieran.

15 MR KIERAN: -- no copy of the affidavit has been served on the notice parties.

16 Now, I state Mr Meehan has kindly given me a copy, I have read through it. I am
17 happy that the affidavit does not address the issue of non-justiciability.

18 JUDGE: All right.

19 MR KIERAN: So it doesn't change the position of the notice parties who would be
20 ready to proceed but perhaps it could be formally served in the normal way and the --

21 JUDGE: All right. I think you are going to get it now.

22 MR KIERAN: May it please the Court.

23 JUDGE: All right. So, we will say 2 o'clock.

24 MR McCANN: Thank you, Judge.

25 JUDGE: All right. Thank you very much. Thank you.

26

27 Adjournment

28

29 REGISTRAR: Good afternoon, Judge.

30 JUDGE: Good afternoon. Very good.

31 REGISTRAR: Now, matter at hearing.

32 JUDGE: Now, Mr Waters?

33 MR WATERS: Good afternoon, Judge.

34 JUDGE: Afternoon.

1 MR WATERS: I propose to respond to the submission of the respondents orally at
2 this point.

3 JUDGE: Okay. But I think in the first instance what you are going to have to do is
4 to move your own application and then of course you can respond.

5 MR WATERS: Yes. Well, I am not entirely sure how we do that but we do wish to
6 move our application --

7 JUDGE: Okay.

8 MR WATERS: -- for certiorari.

9 JUDGE: Very good. Yes.

10 MR WATERS: And to question the constitutionality of this package of legislation
11 and also to question the manner in which it was enacted in the first place and to look
12 at the various methods that were used to create this lockdown and to scrutinise as to
13 whether these were proportionate in terms of their application and whether the
14 constitution -- we are really asking, in the first instance, we have chosen this
15 particular relief which there has been some controversy about I know because we felt
16 so strongly that this requires an injunction of the Court to put an end to this situation
17 where people are being essentially under house arrest and with all the consequences
18 that flow from that, economic, human and indeed deaths arising from that which is
19 a factor that is never mentioned, the consequences of despair in the face of
20 bankruptcy, unemployment and also the atmosphere which has been generated in this
21 time by, in no small part, to the harassment of people by An Garda Síochána and for
22 that reason we wish to move this application today.

23

24 Can I say at the outset as well that there's a really serious I think aspect of this in that
25 it is emerging in the last week that there is a really grossly discriminatory aspect
26 whereby people have been crossing the border apparently and moving freely about in
27 the republic from the north of Ireland with immunity and without the law applying to
28 them and it appears furthermore that this was known to the authorities when the
29 lawyers were being framed and in fact An Garda Síochána Commissioner, Mr Joe
30 Harris, has said as much, that he was privy to the discussions which preceded these
31 events and --

32 MR McCANN: Judge, I don't think any of this is on affidavit.

33 JUDGE: Well, that's as may be but -- yes. Continue, Mr Waters.

34 MR WATERS: Yes. No, if I can just finish the point. That this, it seems to me, is

1 a grossly discriminatory piece of legislation in that context alone. So, I want to
2 move on to the aspects of the submissions which we wish to respond to at this point.

3 JUDGE: Yes.

4 MR WATERS: The first one is in relation to our choice again of certiorari as an
5 option for -- to pursue in this case. As I say we chose it because we regard this as
6 a public case, a public interest case. We are pursuing this in our own interest but
7 also in the public interest and we just selected the relief sought, it is established that
8 an order of certiorari may be granted in respect of the invalidity of a statute.

9 However, should the Court identify that the statutory instruments brought for review
10 before the Court by us to indeed be repugnant of the constitution, the Court assumes
11 a constitutional duty to fashion and implement an appropriate remedy thereof which
12 may include a declaration that the statutory instrument in question is repugnant in the
13 constitution and/or an injunction restraining the respondent from implementing any
14 measures or regulations arising therefrom. So, it is a matter for the Court to issue
15 any additional orders or other orders that it may see fit to do so.

16

17 That's the --

18 MR McCANN: I didn't hear the name of the case, Judge. I think that was a case that
19 --

20 JUDGE: Yes. Well, maybe you would just let Mr Waters make the submission.

21 MR WATERS: I beg your pardon, Judge.

22 JUDGE: I said you carry on now, Mr Waters.

23 MR WATERS: Yes. The matter of the public interest dimensions of this case
24 I would like to read from our affidavit in that regard.

25 JUDGE: Yes.

26 MR WATERS: Both Ms O'Doherty and myself are -- each of us is an applicable
27 person within the definition of same in the legislation and, by extension, in the public
28 interest to all applicable persons within the definition of same in the legislation this
29 new section 31A of the 1947 act as inserted by the Health Act 2020 in the following
30 ways; by restricting our right to travel, my right to travel into and out of the State,
31 prohibiting my right to travel into or out of varies within the State to which an
32 affected areas order applies requiring me to remain in my home, prohibiting me from
33 hosting events which, for the avoidance of doubt, is defined as a gathering of one or
34 more persons not from the same household thereby directly prohibiting my right to

1 freely and consensually engage with other human persons, whether related to me or
2 not who are not members of my immediate household. Prohibiting me from
3 engaging in my right to practice my religion freely in the congregation with others.
4 Prohibiting gatherings which may or may not include peaceful assembly for political
5 or trade union purposes or otherwise. Authorising An Garda Síochána to issue
6 directions to comply with such regulations, including the power to arrest me without
7 warrant and providing for the issue of a class C fine and/or a custodial sentence of up
8 to six months for failure to comply with any direction issued by a member of An
9 Garda Síochána pursuant to the regulations. Authorising the breaking and entering
10 of premises and the direction of (14.08.21) persons other than members of An Garda
11 Síochána of my home without evidential reason or cause and the detention of persons
12 present therein for an indefinite period and the subordination of the powers of An
13 Garda Síochána to such indeterminate persons within the context of such regulations.
14 These render such provision of the Health Act 2020 directly repugnant without
15 lawful basis or justification or cause to the following provisions and protections
16 afforded to me as an Irish citizen and indeed all persons afforded protection by
17 Bunreacht na hÉireann 1937 to whom the definition applicable person applies by the
18 following articles; Article 40.3?

19 JUDGE: 40 point?

20 MR WATERS: Point 31. "The State guarantees in its laws to respect, and, as far as
21 practicable, by its laws to defend and vindicate the personal rights of the citizen."

22 JUDGE: Yes.

23 MR WATERS: And the unenumerated constitutional right to bodily integrity.
24 Article 40 --

25 JUDGE: Before you move on from Article 40.3.1, if I can just get it here, it reads
26 that, "The State guarantees in its laws to respect, and, as far as practicable, by its
27 laws to defend."

28 MR WATERS: Yes.

29 JUDGE: What does as far as practicable mean?

30 MR WATERS: Oh I think that's a matter to be decided in a full hearing, Judge. It's
31 a, as I understand it, a very complex matter.

32 JUDGE: Yes.

33 MR WATERS: And these qualifiers --

34 JUDGE: What do you say --

1 MR WATERS: These qualifiers --

2 JUDGE: What do you say it means?

3 MR WATERS: Well, I think it has to do with various criteria, including the question
4 of proportionality.

5 JUDGE: Yes.

6 MR WATERS: In this case we would be contesting that the grounds of
7 proportionality are totally inadequate to the measures which have been taken.

8 JUDGE: So just on the proportionality point, I mean just take your right of
9 movement, the right to leave your house.

10 MR WATERS: Yes.

11 JUDGE: I think from what you are saying, you accept that's not an absolute right,
12 that can be limited in certain circumstances.

13 MR WATERS: Well, I would say, Judge, that it can be limited perhaps in the
14 context of Article 28.3.3.

15 JUDGE: Right.

16 MR WATERS: But I cannot see any provision in any other article in the
17 Constitution which allows for that in any way whatsoever and it's noteworthy that in
18 1939 when the last major emergency such as the present, even though we'll get to the
19 idea of whether or not this is an emergency in the same terms at all, but that that
20 required an amendment of the Constitution to broaden the scope of Article 28.3.3 at
21 the time and that amendment was done, albeit at the time by a vote of the Oireachtas
22 because it was in the three year transitional period of the Constitution and the
23 Republic. So, I think that the -- our point here is very strongly that the measures
24 which have been taken are unprecedented. They are disproportionate. The evidence
25 is not there to sustain them. There was no verification process of any worth taken to
26 assess the information that was being provided from external sources to the
27 government and indeed at the time at which these laws -- this process began there
28 was absolutely almost no evidence of a serious escalation of this condition called
29 COVID-19 at the time.

30 JUDGE: Yes. Well, can we just look at all that just for a moment or two. You are
31 saying effectively that the laws which limit your right to move around unimpeded
32 have been limited and you are saying that the limitations are disproportionate; isn't
33 that right?

34 MR WATERS: Yes. That's correct, Judge.

1 JUDGE: Okay. All right. And, as you have seen from the State side, what they are
2 saying is that there was a major pandemic of a highly contagious virus which clearly
3 costs lives and that that necessitated limiting the freedom of the citizen to move
4 around on the basis that this appeared to be a highly infectious virus and was easily
5 transmissible from person to person.

6 MR WATERS: Well, Judge, we would dispute many of the things -- or several of
7 the things you have stated there, including the idea that -- well, first of all this was
8 a situation, in terms of the response, completely unprecedented. Although in
9 previous -- many times in the past serious influenza epidemics, for example, have
10 occurred without any such remedies being even discussed or thought about or even
11 mooted. So, that's the first thing. The second thing is that there were other means of
12 going about this. There could have been a reaching out to the public on a voluntary
13 basis to adhere to certain guidelines and I would add in that context that it seems to
14 be a factor that unfortunately the present caretaker of government looks democratic
15 legitimacy and is therefore in a situation where it --

16 JUDGE: I think before -- I know we are going to get into that area in due course but
17 I just don't want to move away from the disproportionate point.

18 MR WATERS: Okay.

19 JUDGE: Because I think that's really at the heart of your submission.

20 MR WATERS: Well, can I move on to the next point then, Judge. That there are
21 countries which have approached this in a different manner. For example, Sweden
22 has had no full lockdown in this sense. There is no evidence that we have come
23 across, conclusive evidence, or even evidence that would, on the balance of
24 probabilities, indicate that lockdown has the effect that is claimed for it by the
25 government.

26 JUDGE: Well, can we just look at the facts because, as you appreciate, Mr Waters,
27 your application has to be based on the facts as you assert them to be.

28 MR WATERS: Yes, Judge.

29 JUDGE: And I am just looking at your grounds and you, just in terms of number of
30 infections and number of fatalities, you effectively appear in your submissions to
31 stop the narrative in or around the 9th or the 10th -- no, the 13th of March when there
32 were I think 90 cases and maybe one fatality.

33 MR WATERS: Well, this is at the point when the legislation was being moved in
34 the first instance.

1 JUDGE: Yes.

2 MR WATERS: And I mean at the very early stages there was something like, I think
3 on the day that the discussion, according to the documentation which we have
4 received from the Department of Health, the discussion on I think the 11th of March
5 there were, at that point, 43 cases when these methods were already in train and so
6 I think that that indicates that this was done without any recourse to a factual
7 analysis, nor were, as far as we can ascertain, any dissenting voices or indeed neutral
8 independent experts consulted as to the validity of this response.

9 JUDGE: But is it relevant at this stage, and I think it is a matter of fact and I am sure
10 it's not going to be disputed, that I think as of yesterday I think there were 21,000
11 infections and a little over 1,300 deaths.

12 MR WATERS: Well, there is a difficulty with that also, Judge, because
13 unfortunately it appears, it is clear now, that there are many question marks over, for
14 example, the death rate, that it appears that the certification process which has been
15 approved by hospitals and also by the coroner indicates it is possible to list as
16 a COVID-19 death any death which there is even the slightest suspicion it appears
17 that it may be a factor, even where no test has been carried out.

18 JUDGE: I see.

19 MR WATERS: And I think that's -- given that it is very difficult to ascertain any
20 difference, ostensibly, between COVID-19 and, for example, a straightforward flu,
21 this is a very I think dubious practice and may have inflated the figures. So what
22 extent we cannot say at this point but we hope as this process unfolds we may be
23 able to get --

24 JUDGE: But even --

25 MR WATERS: By the way, we have asked 30 questions, 30 odd questions of the
26 HSE and they have not answered them.

27 JUDGE: Yes. But if it was the case that as of May the 3rd there were in excess of
28 1,300 deaths, and I hear what you say, you say that maybe they got the reason for
29 death wrong, but if that were the case would you agree that that would require some
30 action by the government?

31 MR WATERS: Not the kind of action that has happened here. I think I would agree
32 that action was needed but I think if you look at the profile of the victims of this, in
33 particular the serious victims. The pattern of this condition appears to be something
34 like this, that whereas many people can have it, 80 % of those or more are actually

1 only mildly affected by it and they tend to be young or stronger people, that the
2 people who are mostly affected are the older people and indeed we have seen, quite
3 appallingly, that 60 % of the deaths have occurred in care homes, especially in
4 nursing homes which appears to be a lacunae in the government's strategy in terms of
5 dealing with this, that whereas they were concentrating on locking up healthy able
6 bodied persons who did not have the condition, they were actually leaving the most
7 vulnerable sections of our population exposed to the threat of infection.

8 JUDGE: So, just to come back to the point on your statement of facts. You are
9 saying that effectively you stopped your narrative concerning the infection rate and
10 the mortality rate on the 13th of March because that was the date upon which the
11 legislation was introduced.

12 MR WATERS: That was when the process of framing this legislation began and at
13 that time there was no basis in the figures to justify --

14 JUDGE: Yes.

15 MR WATERS: -- nor, we would contend, is there yet a basis when you analyse the
16 figures fully and look at where the energies of the society and of its health services
17 might have been directed.

18 JUDGE: Mr Waters, that may well be a view that you have but would you agree you
19 don't appear to have put on affidavit or produced any affidavit to the effect that
20 maybe the fatality figures and the infection figures are overstated?

21 MS O'DOHERTY: Can I speak at this stage?

22 JUDGE: No, actually I am going to talk -- I'd like Mr Waters --

23 MS O'DOHERTY: Sorry, I am a joint party.

24 JUDGE: Excuse me, I'd like Mr Waters to answer that question first and then I will
25 hear from you.

26 MR WATERS: I beg your pardon, Judge. Can you repeat the question please?

27 JUDGE: Yes. I am pointing out that whereas undoubtedly you have expressed the
28 view that mortality figures and infection figures are overstated, that you have not
29 produced any affidavit from a suitably qualified expert to effectively substantiate the
30 view you are putting forward.

31 MR WATERS: Yes, Judge. But we are at a leaf hearing. This is not the full
32 hearing.

33 JUDGE: Oh I appreciate that, yes.

34 MR WATERS: So I mean that's where evidence would be part of the full hearing

1 and of our case when we have obtained leave because at the moment we are held up
2 in this process as we said earlier.

3 JUDGE: All right.

4 MR WATERS: Being stopped at the front gate.

5 JUDGE: Yes.

6 MR WATERS: So, we are not at that stage in the proceedings at all yet.

7 JUDGE: So, you would accept then that that is effectively a gap in your evidence as
8 matters stand but that's the --

9 MR WATERS: No.

10 JUDGE: No, sorry, let me finish, but that's the reason for it.

11 MR WATERS: I don't accept that it is a gap in the evidence for this particular
12 process.

13 JUDGE: Yes, okay.

14 MR WATERS: We are arguing --

15 JUDGE: Now, Ms O'Doherty?

16 MR WATERS: We are making a case for the arguability.

17 JUDGE: Yes, I understand. We will come to all that, the principles in that in
18 a moment. I just wonder --

19 MS O'DOHERTY: I would like to utterly refute everything you are saying there,
20 Judge.

21 JUDGE: Yes.

22 MS O'DOHERTY: Because in fact as the narrative has progressed in recent weeks it
23 brings the State into even more disrepute in terms of their continuance of this mass
24 house arrest of the Irish people, Judge.

25 JUDGE: Yes.

26 MS O'DOHERTY: Because internationally, Judge, the statistics would show that the
27 death rates around the world have now been called into question. We take the United
28 States, for example, where the official body, the Centre for Disease Control, in recent
29 days said that the death rates over there were completely exaggerated. We had the
30 same scenario over in our other neighbours, the Imperial College again --

31 JUDGE: But again, Ms O'Doherty, isn't the problem with all that is that you haven't
32 produced any affidavit --

33 MS O'DOHERTY: Oh, sorry --

34 JUDGE: Excuse me, you have produced no affidavit from a suitably qualified expert

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--
MS O'DOHERTY: Judge, this is all --
JUDGE: -- to verify that.
MS O'DOHERTY: -- for the main hearing and you know that but we are putting it on the record here now, Judge --
JUDGE: Yes.
MS O'DOHERTY: -- that all of the up to date, right up to the minute, and the State knows this well, figures show that all of the initial death rates have been completely downscaled. There have been apologies given to the public around the world for saying sorry we terrified the life out of you. The current death rate is what, point --
MR WATERS: In Ireland?
MS O'DOHERTY: No, no. Internationally.
MR WATERS: It's between .1 to .3 %.
JUDGE: Yes.
MS O'DOHERTY: Now, this is on a par, as the CDC in the United States said two days ago, with a seasonal flu.
JUDGE: Yes.
MS O'DOHERTY: Okay. Now, the other point I really want to make at this stage is that what this lockdown represents, it is --
JUDGE: Ms O'Doherty, we are going to come back to that. I want to stay with Mr Waters because he was opening his application and I think it's much better if we stay with that for the time being.
MS O'DOHERTY: Well, no. I am not finished, Judge, because I don't feel that that satisfied --
JUDGE: Yes. No, I'm sorry, because you are moving on to -- excuse me, you are moving on to another topic.
MS O'DOHERTY: I am not.
JUDGE: And I'd like -- I'd actually like to go back to Mr Waters on this point. Is that all right?
MS O'DOHERTY: Okay. Well, no, Judge, could I please finish my point because it is important --
JUDGE: Well, you certainly can but --
MS O'DOHERTY: -- that we get it --
JUDGE: -- it is not of any great assistance to me at this point in dealing with what

1 I am dealing with with Mr Waters.
2 MS O'DOHERTY: But how do you know what I am going to say, Judge?
3 JUDGE: All right.
4 MS O'DOHERTY: I want to say that lockdown is based on absolutely no science.
5 JUDGE: Yes.
6 MS O'DOHERTY: Never before in the history of humanity have the healthy
7 population been put in quarantine. This has never been done. This is completely
8 untested. Normally what you do, Judge, is you put --
9 JUDGE: Ms O'Doherty, Ms O'Doherty --
10 MS O'DOHERTY: -- the healthy population.
11 JUDGE: Ms O'Doherty, I have that point and that was the point Mr Waters was
12 making.
13 MS O'DOHERTY: It isn't.
14 JUDGE: Well, I think it is.
15 MS O'DOHERTY: Well, I don't think it is.
16 JUDGE: Well, I'm sorry, but --
17 MS O'DOHERTY: And in fact there's now figures to show --
18 JUDGE: You can disagree amongst yourselves, I don't mind, Mr Waters --
19 MS O'DOHERTY: There are now figures to show that lockdown is harming people
20 --
21 JUDGE: I have your point.
22 MS O'DOHERTY: -- because it is denying them the right --
23 JUDGE: And you --
24 MS O'DOHERTY: -- to sunshine and vitamin D. We can produce --
25 JUDGE: -- dispute the infection figures and the mortality figures; isn't that correct?
26 MS O'DOHERTY: -- studies to that effect.
27 MR WATERS: Judge, I mean I do feel that we have already moved into the area
28 that we were fearful would occur in this process.
29 JUDGE: Yes.
30 MR WATERS: Which is that we are seeking to open the entire argument --
31 JUDGE: Yes.
32 MR WATERS: -- about the validity of our case in the sense of the constitutionality
33 of it.
34 JUDGE: Yes.

1 MR WATERS: We are at this stage, as I understood it, as we were informed,
2 seeking to meet the question that we -- the bar of arguable case.

3 JUDGE: Yes.

4 MR WATERS: And I feel that, with all due respect, to talk about witnesses, expert
5 witnesses at this point --

6 JUDGE: Yes.

7 MR WATERS: -- would not be appropriate because we are really not yet -- of
8 course when we have leave we can, you know, begin to work on all of that aspect of
9 it and we have many people in mind. I have just had provisional discussions with
10 many people but at this point we are not in a position to -- because we are waiting, as
11 we said, three weeks on an ex parte application and now we are bogged down and
12 getting further and further bogged down in really what is the main substantive issues
13 in the case and I don't think that's appropriate.

14 JUDGE: All right.

15 MR WATERS: So, if I can continue then. I think I was, yes, Article 40.4.1.

16 JUDGE: Yes.

17 MR WATERS: "No citizen shall be deprived of his personal liberty save in
18 accordance with law."

19 JUDGE: Yes.

20 MR WATERS: Article 40.5, "The dwelling of every citizen is inviolable and shall
21 not be forcibly entered save in accordance with law." Article 40.6.1, "The right of
22 the citizens to assemble peaceably and without arms." Article 41.1.1, "The State
23 recognises the Family as the natural primary and fundamental unit group of Society,
24 and as a moral institution possessing inalienable and imprescriptible rights,
25 antecedent and superior to all positive law."

26 JUDGE: Mr Waters, can I ask you what do you think "Save in accordance with law
27 means"?

28 MR WATERS: In accordance with law, again it is that the government, the State,
29 has the capacity to generate laws on these topics but nevertheless again these are
30 subject to the substantive points of the Article. The State recognises the family. The
31 family precedes the State and exceeds it in importance. It recognises the family as
32 the natural, primary and fundamental unit group of society. So, this is bedrock and
33 as a moral institution possessing inalienable and imprescriptible rights, rights that
34 cannot be taken away and cannot be given up. Antecedent and superior to all

1 positive law. Before all positive law and superior to all positive law. So the
2 question there that you asked me about, about the question of the laws, is subject
3 always to these iron principles and these bring in questions of, as we said,
4 proportionality, necessity and so on.

5 JUDGE: Yes.

6 MR WATERS: And it seems to me that this is what this case may hinge on, these
7 questions, as to what is proportionate and what is not.

8 JUDGE: Yes.

9 MR WATERS: Sorry, I have lost my place again. "The State, therefore, guarantees
10 to protect the Family in its constitution and authority, as the necessary basis of social
11 order and as indispensable to the welfare of the Nation and the State. The State
12 pledges itself to guard with special care the institution of Marriage, on which the
13 Family is founded, and to protect it against attack." Article 44.2.1, "Freedom of
14 conscience and the free profession and practice of religion are, subject to public
15 order and morality, guaranteed to every citizen." Article 45.2.1, "That the citizens
16 (all of whom, men and women equally, have the right to an adequate means of
17 livelihood) may through their occupations find the means of making reasonable
18 provision for their domestic needs." So we believe that furthermore they are directly
19 repugnant to Articles 5, 6, 7, 8 and 11 of the European Convention on Human Rights
20 and Articles 1, 6, 7, 8, 9, 10, 12, 15 and 16 of the Charter of Fundamental Rights and
21 European Communities (Free Movement of Persons) Regulations 2015, Statutory
22 Instrument 548/2015, implementing Directive 2004 38 EC authorising the citizens of
23 member states to move and reside freely within the territory of member states and are
24 and rebutted on grounds more particularly delineated in the statement of grounds.

25
26 Section 2 of the Health Act 2020 amends the Health Act 1947, hereinafter the 1947
27 act, by inserting a new section 38A into such 1947 act --

28 JUDGE: Can I just get a hold -- I have the act here, I just want to have a look at it.
29 Which act? There were two acts and it was the first act or the second act that
30 amended --

31 MR WATERS: Well, we are talking about both.

32 JUDGE: I appreciate that but what --

33 MR WATERS: It is 38A is the relevant one I think because that's the new act.

34 JUDGE: Hold on now, I will just make sure I get it. All right. And it is --

1 MR McCANN: It is the Health Act 2020, Judge.

2 JUDGE: Yes. The act of 47 is amended by insertion of the following section.

3 MR McCANN: Yes.

4 JUDGE: That's what we are talking about just at the moment; is that right?

5 MR WATERS: Yes, that's right.

6 JUDGE: Yes.

7 MR WATERS: So section 38A of the 1947 act as inserted by the Health Act 2020
8 empowers the Minister to make certain regulations provided for, inter alia, the
9 detention and isolation of persons as follows.

10 JUDGE: Yes.

11 MR WATERS: 1. "Where, having regard to the matters specified in subsection (2),
12 a medical officer of health believes in good faith that-

13 (a) a person is a potential source of infection, and

14 (b) the person is a potential risk to public health, and

15 (c) his or her detention and isolation is appropriate in order to-

16 (i) prevent, limit, minimise or slow the spread of Covid-19, and

17 (ii) minimise the risk to human life and public health

18 and

19 (d) such person cannot be effectively isolated, refuses to remain or appears unlikely
20 to remain in his or her home or other accommodation arranged, or agreed, by..." --

21 JUDGE: Sorry, that is section -- I have that in your submissions. I want to get it in
22 the act. What section is that in the act? This is now -- I am looking at the, excuse
23 me, the -- I am looking at the health preservation and protection and other
24 emergencies in the Public Interest Act 2020. So, what section are we looking at
25 there?

26 MR WATERS: I beg your pardon, Judge. Let me see now.

27 JUDGE: This is effectively -- I think what you are referring to is a power of
28 detention; isn't that right?

29 MR WATERS: Yes. Yes, that's right, Judge. I don't have the --

30 MR McCANN: Section 11, Judge.

31 JUDGE: Section 11. Yes, yes. Yes, all right. So you are challenging the effective
32 -- the power whereby a person who is defined as being a potential source of
33 infection, potential risk to the public health and his or her detention and isolation is
34 appropriate, you are saying that the State can now detain that person; isn't that

1 correct?

2 MR WATERS: Yes, that's correct. And that there's been a radical change in the
3 whole protocols and rules with regard to the protection of such people.

4 JUDGE: And what changes are being -- I mean --

5 MR WATERS: Well, I am going to outline now --

6 JUDGE: Yes, certainly. Well please do, yes. Thank you.

7 MR WATERS: "the officer may in writing order the detention and isolation of such
8 person in a hospital or other place specified in the order (including such other
9 hospital or other place as may subsequently be appropriate and specified in the order)
10 until such time as the medical officer certifies that the person's detention is no longer
11 required for the purposes of this section.

12 (4) A medical officer of health who makes an order under subsection (1) shall keep
13 the detention order under review and ensure that a medical examination of the person
14 who is the subject of the order is carried out as soon as possible and in any event no
15 later than 14 days from the time the person has been detained.

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

20 Where a request is made by a person under subsection (5), his or her detention shall
21 be reviewed as soon as practicable and, where a medical officer of health who carries
22 out the review considers that the person is not, at time of review concerned, a
23 potential source of infection, the medical officer shall certify that the person is no
24 longer..." - section 11 -- No. 11 -- No. 1, Health (Preservation and Protection and
25 other Emergency Measures in the Public Interest) Act 2020 - "...required to be
26 detained for the purposes of the section and the person shall be discharged
27 accordingly.

28 Subject to the requirements in relation to medical examination and the period of
29 detention specified in subsection (4) -

30 (a) the provisions of subsections (2) (a) to (g), (3) and (4) of section 38 shall with
31 any necessary modification apply to a person who is subject to detention and
32 isolation under the provisions of this section, and

33 (b) the provisions of subsection (5) of section 38 shall with any necessary
34 modification apply to a person who-

- 1 (i) prevents or attempts to prevent the detention, or the bringing to a hospital or other
2 place, of any person who is subject to detention and isolation under the provisions of
3 this section
4 (ii) assists in an escape or an attempted escape of any person who is subject to
5 detention and isolation under the provisions of this section, or
6 (iii) obstructs or interferes with the exercise of any power conferred by this section.

7
8 (8) A person who is guilty of an offence under this section shall, on summary
9 conviction thereof, be liable to a class C fine or, at the discretion of the Court, to
10 imprisonment for a term not exceeding three months or to both."

11
12 And I go on to say that we, each of us, Ms O'Doherty and I, is an applicable person
13 within the definition of same and the legislation and by extension in the public
14 interest to all applicable persons within the definition --

15 JUDGE: Mr Waters, are there not similar provisions for the detention of a person
16 against their will in the case of a mental health illness?

17 MR WATERS: No, as we go on in the legislation we will see that it does -- rules
18 have been changed completely. The tribunal of three persons which was required in
19 the past is now suspended and only one person, a legal officer of more than seven
20 years' experience, is enabled to make this decision with the consultation with one
21 doctor and, as we shall see, it is not even clear that that is necessary for the detention
22 to take place.

23 JUDGE: Okay.

24 MR WATERS: Each of us as an applicable person in the definition of same in the
25 legislation and by extension in the public interest to all applicable persons within the
26 definition of same of the legislation. This new section 38A of the 1947 act as
27 inserted by the Health Act 2020 which provides that I may be, or any applicable
28 person, may be detained indefinitely without any medically certified justification,
29 detained indefinitely without any medically certified justification, whether or not
30 I am suffering from a disease known as COVID-19 but an indeterminate medical
31 officer of health who may or may not be a clinical practitioner but who is not
32 a member of An Garda Síochána but at whose direction a member of An Garda
33 Síochána must comply in procuring the detention and isolation of me or any other
34 applicable person of indefinite duration and prevented from appealing such detention

1 by withholding of the appeal process afforded to any applicable person detained
2 under the Health Act 1947 from appealing to the Minister for Health if they are
3 detained pursuant to the insertions into the 1947 act by the Health Act 2020. Or is
4 directly repugnant, without lawful basis or justification or cause, in its operation and
5 direct effect on each of us as an applicable person and all persons classed as
6 applicable persons to the following provisions and protections afforded by Bunreacht
7 na hÉireann 1937; Article 43.1, "The State guarantees in its laws to respect, and, as
8 far as practicable, by its laws to defend and vindicate the personal rights of the
9 citizen." And the unenumerated constitutional right to bodily integrity.

10 JUDGE: Yes. Before we leave that, if you just look at section 38A, I mean are you
11 saying that the State, where it has we'll say good grounds to believe that a person is
12 a source of infection and that person will not detain themselves or self-isolate, that
13 the State therefore should simply do nothing about it?

14 MR WATERS: No, I am not suggesting that, Judge. But I think that these methods
15 are unnecessarily crude and unnecessarily in breach of the constitutional rights of
16 individuals. I think the period of the detention, up to 14 days, is pretty much
17 outrageous for somebody who, by the spirit of this entire endeavour, would be
18 presumed to be ill if they were found to be a carrier of this condition. However, we
19 have to also point out that the testing methods for this condition have been shown to
20 be, on a worldwide basis, highly unreliable and it's very unclear what they actually
21 find, whether they can distinguish between one Coronavirus and another in many
22 cases and so on. So, again this will be something that, in a full hearing, should it get
23 that far --

24 JUDGE: So, your criticism of this particular section is that it, undoubtedly, limits
25 the rights of a person who has an infection.

26 MR WATERS: Yes.

27 JUDGE: What about the rights of a person who doesn't have an infection? Is there
28 a right not to be infected?

29 MR WATERS: Of course there is, Judge, but again the measures must be
30 proportionate and they must take a full account of the fact that the vast majority of
31 people at this moment are not carriers of the infection.

32 JUDGE: Yes. So, you'd accept the proposition that the citizen has a right not to be
33 infected.

34 MR WATERS: Well, I don't think that there's any such right in the Constitution.

1 JUDGE: I see.

2 MR WATERS: But it is a matter for the health authorities to deal with infection and
3 to deal with the question -- these are very complicated matters. I mean you spoke
4 about -- we spoke earlier in an exchange about the validity of the lockdown
5 procedures. I mean there are points of view, for example, that hold that separating
6 people is actually the worst possible thing you can do because it effects the
7 development of immunity within the person. I don't necessarily mean just in relation
8 to the condition in question but that the effect of sustained separation from other
9 people and from constant observance of hygiene routines can actually deplete the
10 individual person's immune system and we will be bringing evidence to this effect
11 too in the event that we go to full hearing.

12 JUDGE: Mr Waters, again you certainly have put no evidence to that effect before
13 the Court.

14 MS O'DOHERTY: There are decades long --

15 JUDGE: If I can -- what effectively you are talking about is herd immunity; isn't that
16 right?

17 MR WATERS: Not just herd immunity. Also individual immunity.

18 JUDGE: Yes. But you haven't put any evidence at all before the Court.

19 MS O'DOHERTY: Judge -- sorry, do you mind, John? We will be presenting
20 medical evidence to show, for example, that the denial of vitamin D which comes to
21 us mainly through sunshine, the natural absorption of vitamin D, actually reduces
22 respiratory illnesses such as the one that the State appears to be terrified of.

23 JUDGE: I see.

24 MS O'DOHERTY: Denial of vitamin D reduces the -- sorry, the risk of getting
25 infections like Coronaviruses, which most of us carry, these are the facts, Judge,
26 many of us carry, most of us carry bugs like MRSA, the HPV virus but when we
27 have a healthy strong immune system we don't -- we are not even aware that we
28 carry them. This is the same with the Coronavirus and what is very critical about the
29 testing mechanism is that they have not yet identified COVID-19. So, when they do
30 these tests they get large numbers of people carrying these Coronaviruses because
31 they are basically testing for a genetic material. So, the whole testing system must
32 be called into question but generations of science, generations -- decades of the
33 tradition of science has shown, Judge, that you put the healthy population into -- you
34 put the -- you don't confine them, you don't quarantine them. This has worked

1 forever more. Now, what the State is arguing is that Corona and COVID-19 is
2 utterly different to any other virus that has come before because for some reason herd
3 immunity doesn't apply. Now, I am looking forward to the State producing that
4 evidence, that for some reason centuries long of science, proven by science, that herd
5 immunity is effective, that they are saying no, this is no longer the case. Their case
6 is based fundamentally on scientific fraud, Judge, and we will be able to prove this.

7 JUDGE: Yes.

8 MS O'DOHERTY: You do not quarantine the healthy. Never before has this been
9 done.

10 JUDGE: Very good. Thanks. Mr Waters, yes.

11 MR WATERS: So, I will just continue to read the --

12 JUDGE: Yes.

13 MR WATERS: Article 43.3.1, "The State guarantees the rights ..." -- sorry,
14 Article 40.4.1, "No citizen shall be deprived of his personal liberty save in
15 accordance with law." Article 40.5, "The dwelling of every citizen is inviolable and
16 shall not be forcibly entered save in accordance with law." Article 40.6.1, "The right
17 of the citizens to assemble peaceably and without arms." Article 41.1.1, "The State
18 recognises the Family as the natural primary and fundamental unit group of Society,
19 and as a moral institution possessing inalienable and imprescriptible rights,
20 antecedent and superior to all positive law. The State, therefore, guarantees to
21 protect the Family in its constitution and authority, as the necessary basis of social
22 order and as indispensable to the welfare of the Nation and the State." Article 41.3.1,
23 "The State pledges itself to guard with special care the institution of Marriage, on
24 which the Family is founded, and to protect it against attack." Article 44.2.1,
25 "Freedom of conscience and the free profession and practice of religion are, subject
26 to public order and morality, guaranteed to every citizen." Article 45.2.1, "That the
27 citizens (all of whom, men and women equally, have the right to an adequate means
28 of livelihood) may through their occupations find the means of making reasonable
29 provision for their domestic needs."

30

31 And rebutted on grounds more particularly delineated in the statement of grounds for
32 application for judicial review of Gemma O'Doherty and John Waters dated 14th of
33 April 2020.

34

1 Section 38A (10) of the 1947 act as inserted by the Health Act 2020 provides: "In
2 this section-
3 'potential source of infection' means, in relation to a person, a person who meets one
4 or more of the following criteria:
5 (a) a person who has been in recent contact with a person whom the medical officer
6 of health believes in good faith to be-
7 (i) a probable source of infection of Covid-19, or
8 (ii) suffering from Covid-19."

9
10 16 2020. Health Preservation and Protection and No. 1 statutory -- sorry, section 11
11 "Other emergency measures in the Public Interest Act 2020."

12
13 "(c) A person who has travelled from, or been in contact with a person or persons
14 who has or have travelled from a place outside the State that the medical officer of
15 health believes in good faith to have a significant number of cases of persons
16 infected with Covid-19;
17 (d) a person who has travelled from, to or within, or been in contact with a person or
18 persons who has or have travelled from, to or within a geographical area to which an
19 affected areas order applies;
20 (e) any other person whom the medical officer of health believes in good faith to be a
21 potential source of infection with Covid-19."

22
23 And each of us, myself and Ms O'Doherty, each of us is an applicable person within
24 the definition of same in the legislation and by extension in the public interest to all
25 applicable persons within the definition of same in the legislation. This new
26 section 38A (10) of the 1947 act as inserted by the Health Act 2020 provides that
27 each of us may be or any applicable person may be deemed a potential source of
28 infection, even if not a carrier of COVID-19, nor suffering from symptoms, nor
29 tested for COVID-19 and being deemed such potentially subjected to the breaking
30 and entering detention in isolated provisions as set out in such section 38A and
31 accordingly such section 38A (10) is gratuitously hostile and repugnant to the
32 following provisions and protections afforded by Bunreacht na hÉireann.

33
34 Article 40.3.1, "The State guarantees in its laws to respect, and, as far as practicable,

1 by its laws to defend and vindicate the personal rights of the citizen." Article 40.4.1,
2 "No citizen shall be deprived of his personal liberty save in accordance with law."
3 Article 40.5, "The dwelling of every citizen is inviolable and shall not be forcibly
4 entered save in accordance with law." Article 40.6.1(ii) "The right of the citizens to
5 assemble peaceably and without arms." Article 41.1.1, "The State recognises the
6 Family as the natural primary and fundamental unit group of Society, and as a moral
7 institution possessing inalienable and imprescriptible rights, antecedent and superior
8 to all positive law." Article 41.2, "The State, therefore, guarantees to protect the
9 Family in its constitution and authority, as the necessary basis of social order and as
10 indispensable to the welfare of the Nation and the State." Article 41.3.1, "The State
11 pledges itself to guard with special care the institution of Marriage, on which the
12 Family is founded, and to protect it against attack." Article 44.2.1, "Freedom of
13 conscience and the free profession and practice of religion are, subject to public
14 order and morality, guaranteed to every citizen." Article 45.2.1, "That the citizens
15 (all of whom, men and women equally, have the right to an adequate means of
16 livelihood) may through their occupations find the means of making reasonable
17 provision for their domestic needs."

18
19 We say that these are draconian and grossly disproportionate to the alleged
20 specification for their introduction on each of us as an applicable person and all
21 persons resident in the State designated applicable person and as, set out in the
22 statement of grounds, are furthermore repugnant to Articles 5, 6, 7, 8 and 11 of the
23 European Convention on Human Rights and Articles 1, 6, 7, 8, 9, 10, 12, 15 and 16
24 of the Charter of Fundamental Rights and the European Communities (Free
25 Movement of Persons) Regulations 2015, Nos. 548 2015, implementing Directive
26 2004 38 EC authorising the citizens of member states to move and reside freely
27 within the territory of member states and that ... all was the intent and operation of
28 the Health Act 1947 as enacted ab initio.

29
30 So, then we go on to the emergency measures in the -- I think we will leave that --
31 that's the end of that section, Judge. I want to move on then to the question of our
32 standing and just refer you to a number of --

33 JUDGE: Just before we move on from that section.

34 MR WATERS: Yes, Judge.

1 JUDGE: As I understand your position is effectively this. You contest the accuracy
2 of the figures, both as regards the amount of infection and also the mortality rate.

3 MR WATERS: In addition to the fact that --

4 JUDGE: Sorry, you do contest those?

5 MR WATERS: We do contest those.

6 JUDGE: Yes, all right. That's fine.

7 MR WATERS: Yes, Judge. And also there are other factors as well. I mean the
8 models which were initially published in relation -- which the government appeared
9 to work on, in particular the model published by the Imperial College London which
10 was not peer reviewed and which predicted I think something like 85,000 deaths in
11 Ireland and this was actually stated by An Taoiseach, Mr Varadkar, in a public
12 broadcast as a real threat and so there seems to be again a grave disproportionality
13 between accepting that in good faith these predictions were believed in. First of all
14 the disproportionality is varying but secondly there does not appear to have been any
15 verification process undertaken --

16 JUDGE: I don't have those predictions before me, nor indeed do you, but is it
17 correct to say that those predictions were based on effectively the State taking no
18 steps to limit the spread of the virus?

19 MR WATERS: That was -- yes, I think there was various rationales offered for the
20 measures.

21 JUDGE: Right.

22 MR WATERS: One of the -- in the beginning we were informed that the lockdown
23 was to what, as they say, flatten the curve. Now, this was with a view to protecting
24 the health services from overload. That point has long been passed by the way and
25 this argument has been superseded by others which seem to change on almost
26 a weekly basis now. The justification --

27 JUDGE: I suppose it may be suggested that the reason why that point has been
28 passed is because measures have been taken to limit the spread of the virus. What do
29 you say to that?

30 MR WATERS: Well, I think that that's not quite the correct way of saying it in the
31 sense that I think, as I say, the offered rationale was somewhat different. It was an
32 argument within that because -- first of all I don't believe that there's any evidence
33 anywhere to demonstrate that lockdowns work. If you compare countries which
34 have lockdowns to those which have not lockdown, there is very little difference

1 between them and that -- we will be offering evidence in a full hearing on that
2 question also.

3 JUDGE: Yes.

4 MR WATERS: But certainly the rationale for these measures in the beginning was
5 to avoid pressure on the health services, something which never arose and it's very
6 clear that actually if you look -- this can be done by an analysis of the figures which
7 really raises very serious questions over whether any advantage was gained by any of
8 these measures in particular and that therefore if that were the case, that the abuses of
9 the constitutional rights of citizens, the restriction of those rights and so on was not
10 justified in any way by either the threat or indeed by what transpired in actual fact
11 and I would put it to the Court that, you know, were we to -- were this to be
12 permitted that there is nothing to stop any winter coming from such a lockdown
13 being declared in late October on the basis of models predicting certain outcomes
14 from the influenza season which may or may not be borne out by the facts and that
15 we could be sustained in such a lockdown for several months, if not until the
16 summer, until the beginning of May such as we're now at. So, I think that the
17 questions again of proportionality do not appear to have been very high in the gaze
18 of the individuals making these decisions. There does not appear to have been any
19 verification process, any checking and it is now clear that the downstream
20 consequences of these measures will be far more serious than anything that has been
21 achieved by the State, if such achievement can even be identified, in this particular
22 situation. So, I think that we -- really these are questions, Judge, that ought to have
23 been thrashed out in Dáil Éireann and in the Seanad. They should have been in the
24 media.

25 JUDGE: Aye well now, sorry, we are going to come to what happened in Dáil
26 Éireann and the Seanad in due course and I know that's a separate part of your
27 application.

28 MR WATERS: Certainly, Judge.

29 JUDGE: But in reaching the decisions which the government did, and as they -- in
30 enacting the legislation, were they entitled to take into account the effects of COVID
31 virus in countries other than Ireland.

32 MR WATERS: I think certainly it would be a factor to be considered.

33 JUDGE: Yes.

34 MR WATERS: And those patterns but nevertheless there was a certain ambiguity

1 about the consequences in those countries, for example, Japan had not had the same
2 experience as China and other countries. So, those comparisons do not appear to
3 have been taken up and -- or even made and it appears that, you know, that they
4 jumped to the worst case scenario and acted on that and I mean that's fine if you have
5 -- if you are dealing with health centred measures. I think precautions of that of
6 a certain scale, even exaggerated precautions are justified but when you are making
7 incursions on the most fundamental rights of citizens, I think that it requires an
8 entirely different kind of thought process and a much more steadied and deliberate
9 line of approach and I think that was absent in this. That would certainly be part of
10 our case.

11 MS O'DOHERTY: And again, Judge, if I may say that the figures for Italy have
12 been completely revised downward.

13 JUDGE: I see.

14 MS O'DOHERTY: You are aware of that but despite the fact that Italy was the
15 hardest hit initially in Europe, it did not stop the State from allowing in thousands of
16 Italians when they cancelled the Italian rugby game but for some reason allowed
17 many people to travel from the affected area in northern Italy. You will recall the
18 rugby match which was one of the first things that they decided to cancel.

19 JUDGE: Yes. That's right, yes.

20 MS O'DOHERTY: So, it made no sense that they cancelled the game but they
21 allowed the many, many fans to enter the State and if they -- you know, it's quite
22 clear that they would have been jeopardizing the population of the State and I do
23 want to come back to what Mr Waters has said about the --

24 JUDGE: Right. Just on that point, so what are you saying arises from that, that in
25 fact they shouldn't have cancelled the match?

26 MS O'DOHERTY: What I am saying is it makes absolutely no sense and this once
27 again points to the double standards in the State's case because they cancelled the
28 Italian rugby game but they did not prevent large volume of numbers of Italians
29 coming from the infected region of northern Italy into the State.

30 JUDGE: I see. And you are --

31 MS O'DOHERTY: And as we speak Dublin airport, Cork airport, Shannon airport,
32 all of the other minor regional airports we main open. The border with Northern
33 Ireland remains open and citizens --

34 JUDGE: If I just go back to this, so you are saying in effect, not only should they

1 have cancelled the match, you don't seem to be disagreeing with that decision --

2 MS O'DOHERTY: No.

3 JUDGE: -- but also they should have taken steps to prevent Italian persons coming
4 -- Italians from this particular region coming to the jurisdiction.

5 MS O'DOHERTY: That's not what I am saying. That's not what I am saying, Judge.

6 JUDGE: Right. So, what are you saying then?

7 MS O'DOHERTY: I am saying it once again points to the double standards,
8 scientifically fraudulent approach of the State because if the State cancelled the
9 rugby match on the basis that it was protecting the health of the Irish people, it would
10 surely have stopped the large numbers of fans coming into the State. That's the point
11 I am making, Judge.

12 JUDGE: Yes. But, Ms O'Doherty, when did you come to the conclusion that what
13 the State was doing was scientifically fraudulent?

14 MS O'DOHERTY: Well, I will give my own background in this. I was a journalist
15 with the Irish Independent for nearly 20 years where I was chief features writer.
16 I spent a lot of my time writing about health. I have won awards for my work
17 investigating health and issues around disease. So, I can speak from some
18 experience. Very early on -- what we have to do as journalists is examine the facts,
19 the facts, and particularly in regard to this where the Constitution is effectively being
20 shredded and all of the basic rights of citizens are being trampled upon. So, it is
21 very, very important that journalistically we examine the facts. So, all of this of
22 course will be discussed at a later stage when you have --

23 JUDGE: Yes. But I am just wondering why, given your journalistic background and
24 your experience, nowhere in your affidavit have you said that the information which
25 the government was acting on was scientifically fraudulent.

26 MS O'DOHERTY: I think we have stated many -- in many --

27 JUDGE: Well, could you show me on affidavit where --

28 MS O'DOHERTY: I think we have stated throughout, Judge, that we have called
29 into question the manner in which the State has put the country under mass house
30 arrest.

31 JUDGE: You certainly have but --

32 MS O'DOHERTY: And we have been questioning --

33 JUDGE: -- where in your affidavit do you say the State was acting on scientifically
34 -- was acting fraudulently on its scientific information?

1 MS O'DOHERTY: Well, John, would you just read that particular article out. We
2 have made this on a number of occasions.

3 JUDGE: I am talking about your affidavit. Where is it in the affidavit?

4 MS O'DOHERTY: Mr Waters will find it there.

5 JUDGE: Yes.

6 MS O'DOHERTY: Just while we are getting that, Judge, I want to put on the record,
7 which we have already I think, we have been requesting answers from the State in
8 regard to the registration of deaths. More than four weeks ago, Judge, we sent --

9 MR WATERS: I think that's in our statement of grounds.

10 MS O'DOHERTY: It is in the statement of grounds.

11 JUDGE: Scientifically fraudulent?

12 MR WATERS: Well, no, we didn't say --

13 JUDGE: I see.

14 MS O'DOHERTY: I don't know did we actually use that terminology.

15 JUDGE: Well, what terminology did you use?

16 MS O'DOHERTY: Well, we would have looked at the evidence internationally in
17 the statement of grounds which --

18 JUDGE: Sorry, where is that in the statement of grounds? You certainly have
19 recorded what the WHO did and --

20 MS O'DOHERTY: But --

21 JUDGE: I am looking at paragraph 4. You don't seem to say that anywhere in your
22 grounds.

23 MS O'DOHERTY: What I want to just add, Judge, is that we have been asking the
24 State for more than four weeks, the measures through which they registered deaths.

25 JUDGE: Yes. Before we move off from that point, let's just stick on this one for
26 a moment, you don't seem to have said anywhere in your grounds that the State was
27 acting -- was either acting fraudulently or the scientific information which the State
28 was acting on was fraudulent.

29 MS O'DOHERTY: Of course. That is the whole grounds for --

30 JUDGE: But it's not in your grounds.

31 MS O'DOHERTY: -- our case, Judge, because --

32 JUDGE: It's not in your grounds, Ms O'Doherty.

33 MS O'DOHERTY: It is.

34 JUDGE: Well, where is it?

1 MS O'DOHERTY: That is the whole basis --

2 JUDGE: Excuse me, Ms O'Doherty, it's a simple --

3 MS O'DOHERTY: -- that this is an act of fraud against the Irish people.

4 JUDGE: Ms O'Doherty, a simple question, where is it in the grounds?

5 MR WATERS: Judge, we have only in the last few days, in the late hours of
6 Sunday, received an avalanche of papers --

7 JUDGE: I see.

8 MR WATERS: -- and on a perusal of those it is clear that the State -- the case was
9 very fragile indeed but we haven't at this point had time to deal or to process that
10 information because we are not yet at the full hearing and it seems to me that this
11 hearing is being turned into a full hearing of the issues when in fact this hearing is to
12 take -- to assess whether we have an arguable case or not --

13 JUDGE: Yes. You are absolutely correct.

14 MR WATERS: -- about the constitutionality.

15 JUDGE: And we will come to that in a moment but I just want to get the case you
16 are making, yes.

17 MR WATERS: Yes. I mean our case is simply that the process by which this
18 legislation was implemented was very hasty --

19 JUDGE: Sorry, Mr Waters, I really don't want to be interrupting you but what I want
20 to do is I want to, in a sense, do it in two blocks, if you like. Firstly your contention
21 that the legislation and regulations are against the Constitution. That's block No. 1.
22 And block No. 2 is your second contention which is effectively your criticism of the
23 houses of the Oireachtas in the manner in which the legislation was passed. So,
24 I don't want to move just from one to the other.

25 MR WATERS: Certainly. I understand that.

26 JUDGE: Until you have finished one if you don't mind.

27 MR WATERS: Yes.

28 JUDGE: And of course you can then come back to the other if you wish.

29 MR WATERS: And which one are we --

30 JUDGE: So, at the moment I think we are looking at your contention that the
31 legislation and the regulations are unconstitutional. So, that's what I'd like to
32 concentrate on just for the time being.

33 MR WATERS: Yes.

34 MS O'DOHERTY: Well, I do believe that that is a matter for the actual substantive

1 hearing.

2 JUDGE: Yes. Well --

3 MS O'DOHERTY: And we will have no shortage of medical evidence to show that
4 this is utterly --

5 JUDGE: Yes. I appreciate that.

6 MS O'DOHERTY: -- fraudulent.

7 JUDGE: Yes. That's the second time you have told me that.

8 MS O'DOHERTY: Yes.

9 JUDGE: No, I have that point. So, can we just go back to the constitutionality of the
10 regulations and then we can move on to the -- your criticism of the manner in which
11 the legislation was passed and I think you were dealing with -- you just dealt with
12 section 38 I think.

13 MR WATERS: Yes. I had finished reading in a section from the --

14 JUDGE: Yes.

15 MR WATERS: Yes. So, I wanted to move on then to deal with some case law in
16 relation to the issue of our standing.

17 JUDGE: Yes, certainly, yes. You are absolutely right, yes. Very good.

18 MR WATERS: Yes. So the State has cited various cases.

19 JUDGE: Yes.

20 MR WATERS: Which we believe are somewhat weak in that regard.

21 JUDGE: Okay.

22 MR WATERS: And we would like to --

23 JUDGE: I mean the cases are fairly well known in this area.

24 MR WATERS: Yes.

25 JUDGE: I am sure you appreciate.

26 MR WATERS: And there are other cases as well, Judge, which the State has not
27 referred to.

28 JUDGE: Yes.

29 MR WATERS: For example, in the case of Crotty v. An Taoiseach --

30 JUDGE: Yes.

31 MR WATERS: -- Finlay CJ said, "In the High Court the plaintiffs claim was
32 rejected on the grounds that because the SEA..." - that's the Single European Act -
33 "...had not yet been ratified by the State and because the Act of 1986 had not yet
34 been brought into

1 Effect the plaintiff failed to establish that he had a locus standi to challenge the
2 validity of the Act
3 Of 1986 having regard to the provisions of the Constitution." And the judge went
4 on, "The Court is satisfied, in accordance with the principles laid down by the Court
5 in Cahill v. Sutton [1972] IR 269, that in the particular circumstances of this case
6 where the impugned legislation, namely the Act of 1986, will if made operative
7 affect every citizen, the plaintiff has a locus standi to challenge the Act
8 notwithstanding his failure to prove the threat of any special injury or prejudice to
9 him, as distinct from any other citizen, arising from the Act."

10

11 I think that in what I have -- in the foregoing I think I have shown that we are indeed,
12 much more strongly than in the Crotty case, applicable person. Clearly we are
13 applicable persons.

14 JUDGE: I think what you are saying is look you no sooner do you leave your house
15 than you are met with these regulations.

16 MR WATERS: Well, actually we don't even have to leave our house, we can see
17 them outside the window, Judge.

18 JUDGE: Okay.

19 MS O'DOHERTY: And, Judge, I have just had to attend the Bridewell as a result of
20 this ongoing harassment.

21 JUDGE: Yes.

22 MS O'DOHERTY: Because I was -- I have been stopped so many times, maybe
23 I am stopped 10 times a day, Judge.

24 JUDGE: Yes.

25 MS O'DOHERTY: And, you know, it varies. I could be stopped 10 times a day,
26 I could be stopped twice a day. It is absolutely outrageous. I have not ever been
27 convicted of motoring offences in relation to, you know, failure to show insurance
28 disc or extremely precise about all of that. I was stopped at a check point two or
29 three days ago and I told the garda in question that I was involved in litigation
30 against the State in relation to these regulations and that gives you the freedom to
31 move about and he did not accept that.

32 JUDGE: Yes, I see.

33 MS O'DOHERTY: And then he told me that I had to present my certificate of
34 insurance to a garda station and we spent almost half an hour or longer in the

1 Bridewell station there this afternoon. This is an absolute waste of my time. It is an
2 infringement of my basic liberties. It is defamatory and the avalanche of cases that
3 are going to come before the case because that is minor, it is also a terrible waste of
4 garda resources and taxpayer's money, that is minor, Judge, but some of our citizens
5 are really, really being badly treated. Now you know, Judge, that we have the best
6 habeas corpus laws in probably the world, the strongest, and the detention of citizens
7 on these grounds is absolutely abhorrent.

8 JUDGE: Yes.

9 MS O'DOHERTY: We have hundreds of people, Judge, who have tried to come to
10 this court in recent days, they have come from, in recent weeks, every corner of
11 Ireland and many of them are standing outside your court now. They feel very, very
12 disgruntled at the fact that they have been denied entrance. They are being harassed
13 as we speak by members of An Garda Síochána. Their names are being taken down.
14 This is outrageous. This is -- these are the actions of a police state and --

15 JUDGE: I think, Ms O'Doherty, I think we are beginning to stray away from what
16 we are dealing with which is the issue as to whether or not there is an arguable case
17 to be made for this matter under which I could grant leave for you to seek judicial
18 review.

19 MS O'DOHERTY: I am stating that I have locus because I have been personally
20 affected --

21 JUDGE: Yes. No, you have said that. But, for example, Mr Waters, one of the
22 things which you -- one of the pieces -- sections of the legislation you attack is the
23 amendment of the Residential Tenancies Act 2004.

24 MR WATERS: It is, yes.

25 JUDGE: And the question may well be asked, although clearly you are against the
26 provisions, but do they materially affect you in any way?

27 MR WATERS: Well, I think they have the potential to effect either of us at any time
28 and that's a critical criterion also.

29 JUDGE: Right.

30 MR WATERS: So, not all of the provisions necessarily will affect us at this
31 particular time or at any particular time.

32 JUDGE: Yes.

33 MR WATERS: But by their nature, and that I think is the principle that needs to be
34 reached or to be established in this.

1 JUDGE: Now, you were referring to Cahill and Sutton.

2 MR WATERS: Yes. I was referring actually to Crotty v. An Taoiseach.

3 JUDGE: Okay.

4 MR WATERS: And it seems to me that that case -- and also we have submissions in
5 relation to other cases, to Cahill and Sutton. I will just go through that very briefly.

6 JUDGE: Yes.

7 MR WATERS: With reference of the respondents to Cahill and Sutton, and it's the
8 referent in particular to abuse of speculative litigation amounts I believe to
9 a generalised slur on us and our application for leave to --

10 JUDGE: Are you reading from your -- what are you reading from because I don't
11 know if I have it or not?

12 MR WATERS: It is just some notes of mine, Judge.

13 JUDGE: I see, all right. I'm sorry, that's absolutely fine. Yes.

14 MR WATERS: It is not a submission to the Court.

15 JUDGE: Yes, that's okay.

16 MR WATERS: On our application for judicial review in this case we believe that
17 we are applicable persons and we have delineated the direct effect of the provisions
18 of the legislation on ourselves and also on others and it must be remembered also,
19 Judge, that as journalists we are in constant communication with members of the
20 public who have grievances, difficulties, situations which trouble them in these times
21 and indeed at all times, that we receive voluminous correspondence, both
22 Ms O'Doherty and I, from members of the public speaking to us because it seems
23 that they are unable to approach the politicians who seem to be of one mind on these
24 matters and they come to us instead. So, that's a major factor I think also in relation
25 to the public interest dimension of this case, that we are in that role. Yes, and we
26 will be submitting and indeed offering witnesses to the Court from people who have
27 approached us in that regard about, for example, being denied health care for other
28 conditions other than COVID-19 and this is another factor which is not -- there
29 seems to have been no predicted strategy with regard to that, that the people who
30 have cancers, heart disease and other serious conditions are actually being put at
31 grave risk because of this situation in our hospitals which is generated by this
32 particular --

33 JUDGE: Is there not a provision in the rules concerning movement that you may of
34 course leave your house for the purposes of getting medical attention?

1 MR WATERS: Indeed but I think the problem may be that people cannot actually
2 get access. I mean I myself have a medical condition for the past year and I had
3 several appointments cancelled by hospitals over the past couple of months in that
4 context because of this COVID-19 situation, that they are suspending appointments
5 for lots of different situations and conditions --

6 JUDGE: There's nothing in the legislation to say that hospitals are not to treat people
7 for other than COVID-19 conditions.

8 MR WATERS: Yes. I think in addition, Judge, there is also a genuine fear because
9 of the hysteria which has been generated by the media on this topic, people are
10 genuinely afraid in many instances to actually go into hospital for fear they will
11 actually catch COVID-19, the SARS-CoV-2 virus and develop COVID-19 and
12 I think that's something that doesn't appear to have been anticipated. There doesn't
13 seem to be any attempt to segregate hospitals into -- where they could be specialising
14 in COVID-19 but it seems to be a general situation where hospitals which are in
15 regular use for all kinds of conditions are now almost exclusively --

16 JUDGE: Is that correct because I mean I had thought the position was that hospitals
17 are effectively divided into two; A) COVID areas and B) non-COVID areas.

18 MR WATERS: There are in many hospitals but the problem is that people are not
19 aware and there doesn't seem to be any real communication about this. People are
20 frightened that they will -- if they go into hospital, and I myself have been in
21 communication with two different hospitals in this and indeed, you know, having
22 spoken to them, I was advised by people in those hospitals not to take up the
23 appointment at this time. So --

24 MS O'DOHERTY: We have been contacted, Judge, by a lot of people --

25 JUDGE: Yes.

26 MS O'DOHERTY: -- who have been in hospital during this period. They say that
27 they felt very, very isolated. They felt particular concern for elderly people. We also
28 will be producing evidence that it would appear that a lot of the diagnostics in some
29 of the bigger hospitals, the acute hospitals in Dublin seem to have come to an end.
30 They seem to have closed for the duration. We don't know why. We know that the
31 consultants are very, very concerned about the co-opting of the private hospitals in
32 the country to the care of the State or the control of the State. The medical
33 consultants are very, very concerned and we know that at least one doctor has spoken
34 out publicly questioning the whole approach of the State. So, we will be presenting

1 evidence from many patients who say that they are being discriminated against
2 because they do not have COVID-19 but maybe they are dying of cancer, maybe
3 they have chronic heart disease. This is an outrageous breach of their constitutional
4 rights.

5 JUDGE: Very good. Can we get back to the regulations and the act, are there other
6 sections in the act which you are contesting?

7 MR WATERS: Yes, Judge, there are and I will go through those now at this point.

8 JUDGE: Yes.

9 MR WATERS: Health Act 1947 (Section 31A -Temporary Restrictions) (Covid-19)
10 Regulations 2020 hereinafter the Restrictions Regulations 2020. The preamble of
11 the regulation states, "The Minister for Health, in exercise of the powers conferred
12 on him by sections 5 and 31A (inserted by section 10 of the Health (Preservation and
13 Protection and other Emergency Measures in the Public Interest) Act 2020 (No. 1 of
14 2020)) of the Health Act 1947 (No. 28 of 1947) and -

15 (a) having regard to the immediate, exceptional and manifest risk posed to human
16 life and public health by the spread of Covid-19 and to the matters specified in
17 subsection (2) of section 31A, and

18 (b) having consulted with the Minister for Finance, the Minister for Public
19 Expenditure and Reform and the Minister for Justice and Equality hereby makes the
20 following regulations."

21
22 We say that in the first instance such preamble to the Restrictions Regulations 2020
23 is repugnant to the provisions of Article 15.2.1 of the Constitution --

24 JUDGE: Sorry, just before -- we better have a look at Article 15.2.1 now before you
25 move on. Yes. So Article 15.2.1 reads, " The sole and exclusive power of making
26 laws for the State is hereby vested in the Oireachtas: no other legislative authority
27 has power to make laws for the State."

28 MR WATERS: Yes.

29 JUDGE: And why do you say this legislation breaches that Article?

30 MR WATERS: Because these are laws which are being clearly made by a Minister
31 of the outgoing government and not passed through the Oireachtas, these particular
32 regulations.

33 JUDGE: But I mean, you know, Mr Waters, you know probably as well as I do, that
34 many, many acts of the Oireachtas make specific provision for a Minister to make

1 regulations under the act to give effect to the act; isn't that right?

2 MR WATERS: Indeed, yes but I think that the --

3 JUDGE: So, what's different here?

4 MR WATERS: Well, I think that the relationships between the 1947 act and the
5 2020 legislation and again between that and the regulations signed by the Minister
6 reflects really a very rapid escalation of the kind of powers which are in the original
7 1947 act and in that sense bear no relationship to the spirit of that legislation.

8 JUDGE: Well, sorry, I want to sort of take that sort of step by step. The 2020 act
9 amends the 1947 act; isn't that right?

10 MR WATERS: Yes, that's right.

11 JUDGE: And the 2020 act adds in section 31 and section 31 says that all sorts of
12 restrictions can be made on the citizen -- sorry, the right of the citizen to move
13 around; isn't that right?

14 MR WATERS: Indeed.

15 JUDGE: Right, okay. So, that's in the act. I know you contest it but it's there.

16 MR WATERS: Yes. But there are then --

17 JUDGE: All right, okay.

18 MR WATERS: -- within the regulations --

19 JUDGE: And then the regulations come in and they specify certain matters; isn't that
20 right?

21 MR WATERS: Yes. But our case is that, in part, that the gravity of these measures,
22 and their unprecedented nature, require them to be placed before the Oireachtas, that
23 such radical legislation as this is -- which again requires to be subject of the
24 Constitution.

25 JUDGE: Yes, I know. I appreciate that point but I am just wondering, I mean what
26 would you say to the proposition, the act sets out the various restrictions that can be
27 imposed on the citizens.

28 MR WATERS: Yes.

29 JUDGE: And regulations can be made thereunder and would you agree that that's
30 what those regulations are, they're in effect giving effect to what's in the act had.

31 MR WATERS: Well, there are many aspects of this that are questionable and we
32 would go -- we wish to go into those in a few moments but --

33 JUDGE: All right.

34 MR WATERS: -- in this particular context, as I say, these measures are really

1 unprecedented in our history. They effectively suspend the Constitution. It is not
2 appropriate that such radical legislation would be introduced without the oversight of
3 the Oireachtas.

4 JUDGE: Well, why would you say they suspend the Constitution?

5 MR WATERS: Well, clearly they do if they are restricting the freedom of people to
6 leave their homes, to walk distances from their houses and so on. All of the
7 provisions which are in these regulations. This is completely unprecedented. In
8 effect it sets at naught the provisions of the Constitution. Many of the provisions.
9 Many of the most fundamental provisions of the Constitution are set at naught by
10 these provisions.

11 JUDGE: But then aren't we back to the point which we have discussed earlier that --

12 MR WATERS: Yes. I think it might be --

13 JUDGE: Sorry, all these articles in the Constitution are all subject to as far as
14 practicable and insofar as the law may allow. None of them are absolute.

15 MR WATERS: No but they are not null either, Judge.

16 JUDGE: Yes. And this is back to your disproportionate point.

17 MR WATERS: Yes.

18 JUDGE: Yes, all right.

19 MR WATERS: This might be an appropriate time to bring up another factor which
20 is related to this particular aspect of it and it's that -- the question of whether or not
21 these regulations have been in force at all in the last few weeks.

22 JUDGE: Sorry, whether they have been enforced at all?

23 MR WATERS: In force.

24 JUDGE: In force, oh sorry, yes. Go on, yes.

25 MR WATERS: Yes. We would say that there's serious doubt about this because we
26 argue that there have been -- the regulations have not been in force since the 12th of
27 April which is Easter Sunday and for that reason any use of force by members of An
28 Garda Síochána or duress by An Garda Síochána since that date is unlawful.

29 JUDGE: And how do you mean they haven't been in force? I don't follow that
30 point.

31 MR WATERS: Well, the situation is that the original law is that these were not
32 published in Iris Oifigiúil at the time they were put into force.

33 JUDGE: When were those regulations signed? Is it the 12th of April?

34 MR WATERS: The 10th of April I believe.

1 JUDGE: Right. And was notice then published in an Iris Oifigiúil?

2 MR WATERS: Well, they didn't appear in Iris Oifigiúil as I understand until the
3 14th of April.

4 JUDGE: And does it have to appear instantaneously or the same day?

5 MR WATERS: Well, I will read you out the relevant section of the statutory
6 instrument in question.

7 JUDGE: Yes. Sorry, that's --

8 MR WATERS: This is Statutory Instrument Act 1947 3 --

9 JUDGE: Hold on now, hold on now. I do want to get hold of this now. Statutory
10 instrument -- that's the act. Yes. I am not terribly sure that I have that. Has anybody
11 got -- is there a copy of those statutory instruments in any of the books?

12 MR McCANN: No, Judge. This is not a point made in the statements of grounds.

13 JUDGE: All right. All right. Anyway read out what it says.

14 MR WATERS: Yes. It is Statutory Instrument Act 1947/3/3. "Where (a) a person
15 (in this subsection referred to as the defendant) is charged with the offence of
16 contravening (whether by act or omission) a provision in a statutory instrument to
17 which this Act primarily applies, and (b) the prosecutor does not prove that, at the
18 date of the alleged contravention, notice of the making of the said statutory
19 instrument had been published in the Iris Oifigiúil, the charge shall be dismissed,
20 unless the prosecutor satisfies the Court that at the said date reasonable steps had
21 been taken for the purpose of bringing the purport of the said instrument to the notice
22 of the public or of persons likely to be affected by it or of the defendant."

23 And --

24 JUDGE: So, what do you say all that means?

25 MR WATERS: Well, my understanding of the situation, Judge, is that given that
26 there was a gap of one day between the lapsing of the previous statutory instrument
27 and the commencement by publication in Iris Oifigiúil that there was -- that the
28 entire process needed to be started again from scratch.

29 JUDGE: I see.

30 MR WATERS: And that it was not simply a matter of continuing, nor indeed could
31 the instrument simply be renewed. It had to be redone from the beginning.

32 JUDGE: I see, I see.

33 MS O'DOHERTY: And as part of that point, Judge, we want to stress that there
34 were many citizens who could take very serious actions against the State for this,

1 people who have been unlawfully detained during this period. This very specific
2 period but also --

3 JUDGE: Well, Ms O'Doherty, that's as may be but that's really for a different court
4 at a different time.

5 MS O'DOHERTY: Well, we would like to be in a different court fighting the actual
6 judicial review and not here.

7 JUDGE: Yes. Well, at the moment we are dealing with the leave application so let's
8 not move away from that.

9 MS O'DOHERTY: Well, over one month at this stage.

10 JUDGE: Yes.

11 MS O'DOHERTY: But there are many other irregularities of course that John is
12 going to allude to now.

13 JUDGE: Yes. And are these in your grounds?

14 MS O'DOHERTY: Well, Judge, just on this very point, I want to come back to what
15 you are saying --

16 JUDGE: No, sorry, it is a simple question. Are these --

17 MS O'DOHERTY: Judge, you want to now have oral hearings, okay --

18 JUDGE: Ms O'Doherty --

19 MS O'DOHERTY: This is an oral hearing --

20 JUDGE: -- a very simple question, are these irregularities, which Mr Waters is now
21 going to refer to, are they set out in your grounds?

22 MR WATERS: These have only just come to our attention, Judge.

23 JUDGE: I see. So, they are not in your grounds.

24 MR WATERS: No, they are not at this time.

25 JUDGE: All right, okay.

26 MS O'DOHERTY: These would have been --

27 MR WATERS: Because they occurred -- I beg your pardon, sorry. They occurred,
28 this breach occurred just the day before we launched our application.

29 JUDGE: I see. But they are not in the grounds.

30 MR WATERS: They are not in the grounds, no.

31 JUDGE: So it's not in what's before me.

32 MR WATERS: No. It is something that has just come to our notice.

33 JUDGE: All right, okay.

34 MR WATERS: And --

1 JUDGE: Well, you appreciate that if they are not in the grounds before me I can't
2 deal with them.

3 MS O'DOHERTY: Well, really? Is that right, Judge? Why are we having this
4 hearing then? I mean is it only about the statement of grounds. What is the value of
5 our all being here today at an enormous cost to the taxpayer.

6 JUDGE: Yes. Well, Ms O'Doherty, I think at this stage you know well why we're
7 here. We are here because you have, yourself and Mr Waters, have set out in
8 considerable detail a statement of grounds under which you wish the Court to give
9 you leave to seek judicial review and that's what we are dealing with and the
10 application really falls or succeeds or falls on the point as to whether you have an
11 arguable point.

12 MS O'DOHERTY: But you want to have these oral hearings and yet we are not
13 allowed to introduce new evidence that has come --

14 JUDGE: Well now, Ms O'Doherty, I am sure in all your experience as a journalist,
15 and I am sure you have covered very many court cases, you are fully aware of the
16 fact that a person cannot come into court and make a case which is simply not in the
17 pleadings before the Court or is not alluded to in the pleadings before the Court.

18 MS O'DOHERTY: I -- well, I --

19 JUDGE: Would you not agree with that?

20 MS O'DOHERTY: What I will say is that as we speak the people of our country are
21 under mass house arrest.

22 JUDGE: I see, all right. Okay.

23 MS O'DOHERTY: They are being unlawfully detained in their homes. This is
24 unprecedented.

25 JUDGE: You certainly mentioned all that. I appreciate that.

26 MS O'DOHERTY: And this is why, Judge, we are here today, our fourth appearance
27 in as many weeks appealing to you to pass this on to a judicial review so that the
28 substantive issue can be heard before a different court because we really do feel --

29 JUDGE: Yes.

30 MS O'DOHERTY: -- that at this stage it's just back and forth. This should have
31 been dealt with by now. Many cases have taken place around --

32 JUDGE: Ms O'Doherty, I really feel at this stage we are being to drift a little bit far
33 away from what we are here for.

34 MR WATERS: Well, if I can address, Judge, the instant point. I mean --

1 MS O'DOHERTY: Well, that's just always the case, isn't it?

2 MR WATERS: -- in drawing this to your attention, Judge, it is not necessarily our
3 intention to incorporate it as part of our grounds --

4 JUDGE: Well, that's all right.

5 MR WATERS: -- but nevertheless it being to do with a gross illegality which has
6 the An Garda Síochána, if it is correct, if it can be investigated --

7 JUDGE: I see. Mr Waters, I think you fully appreciate the issue for the Court is that
8 if it's not in the grounds, the Court really can't do much.

9 MR WATERS: Well, does the Court not have a responsibility to alert the --

10 MS O'DOHERTY: It is your job to uphold this Constitution.

11 JUDGE: Yes.

12 MS O'DOHERTY: Now, you are -- what you have been doing with us since we
13 came in here, and you know that we are lay litigants so all the more reason for you to
14 give us guidance, but your only priority in here, Judge, is to defend this and to
15 defend the rights of the citizens. We have given you ample examples of how
16 citizens' rights are being trampled upon, abused. We have told you that there are
17 citizens of Ireland coming from Northern Ireland into the Republic and they can do
18 what they want while the citizens who live here must stay in their homes. How is
19 that constitutional, Judge?

20 JUDGE: You are absolutely right. I mean, Ms O'Doherty, you are undoubtedly lay
21 litigants but equally you will have seen in the Constitution that there is a provision as
22 to equality before the law.

23 MS O'DOHERTY: Exactly.

24 JUDGE: So, whether you are lay litigants or represented, the same law applies; isn't
25 that right?

26 MS O'DOHERTY: Well, we have told you, Judge, for example --

27 JUDGE: And I think the fundamental problem which you are dealing with at the
28 moment is that both yourself and Mr Waters now wish to seek leave to seek judicial
29 review in respect of grounds which you have not set out in your grounds.

30 MR WATERS: Well, I beg your pardon, Judge, this is not what is happening here.
31 We are simply, in the course of an exchange between myself and yourself, Judge --

32 JUDGE: Yes.

33 MR WATERS: -- concerning the statutory instrument, it occurred to me that this
34 was something worth mentioning at this point because I assumed that it was of such

1 grave import that it would certainly alert the Court and thereby the authorities to the
2 possibility at least that a serious illegality is happening out there on the streets where
3 people are being harassed and hounded by An Garda Síochána without any lawful
4 basis.

5 JUDGE: Yes. Maybe we should probably get back to what's actually in your
6 grounds.

7 MR WATERS: Okay.

8 JUDGE: Very good. Thank you.

9 MR WATERS: Thank you very much. So --

10 JUDGE: Now, I think you were dealing with --

11 MR WATERS: Yes, I was reading out a section -- sorry, I was moving on to the
12 next section which is restriction of movement of applicable persons.

13 JUDGE: Yes.

14 MR WATERS: 24. Section 4 of the restriction legislation provides as follows: "An
15 applicable person shall not leave his or her place of residence without reasonable
16 excuse.

17

18 (2) Without prejudice to the generality of what constitutes a reasonable excuse for
19 the purposes of paragraph (1), such reasonable excuse includes an applicable person
20 leaving his or her place of residence (in this paragraph referred to as the 'relevant
21 residence') to -

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

24 (b) go to an essential retail outlet for the purpose of obtaining items (including food,
25 beverages, fuel, medicinal products, medical devices or appliances, other medical or
26 health supplies or products, essential items for the health and welfare of animals, or
27 supplies for the essential upkeep and functioning of the relevant residence), or
28 accessing services provided in the outlet, for the applicable person or any other
29 person residing in the relevant residence, (c) go to an essential retail outlet for the
30 purpose of obtaining items (including food, beverages, fuel, medicinal products,
31 medical devices or appliances, other medical or health supplies or products, essential
32 items for the health and welfare of animals, or supplies for the essential upkeep and
33 functioning of the place of residence of a vulnerable person), or accessing services
34 provided in the outlet, for a vulnerable person, d) obtain money for -

- 1 (i) the applicable person
2 (ii) any other person residing in the relevant residence, or
3 (iii) a vulnerable person, (e) attend a medical appointment or accompany, to a
4 medical appointment, any other person residing in the relevant residence or..." --

5 JUDGE: I have the regulations in fact, sorry, yes.

6 MR WATERS: Okay. So, I will just go to the end then. I say again that each of us
7 is an applicable person and directly affected by the operation of such section 4 in that
8 each of us is now criminalized for leaving our home attracting a penalty of up to
9 €2,500 and/or six months' imprisonment unless such departure from our home is for
10 one of the prescribed reasons as set out in section 4 by the Minister. This section 4
11 accordingly is directly repugnant, without lawful basis or justification or cause to the
12 following provisions and protections of Bunreacht na hÉireann 1937. And in this
13 case it's just the one article, Article 40.3.1, "The State guarantees in its laws to
14 respect, and, as far as practicable, by its laws to defend and vindicate the personal
15 rights of the citizen." Section 4 directly effects each of us and all persons designated
16 applicable persons in our Constitution and direct, immediate and sustained
17 interference and attack on our personal rights in prohibiting our transit outside the
18 boundary of our home within the entirety of the State and outside the State, save for
19 exercise on foot within a two kilometre radius with a member of our immediate
20 household, if any, and the reasons unilaterally prescribed by the Minister is thereby
21 preventing the exercise by each of us of our personal right to engage with persons
22 outside of our immediate household and form relationships, whether business or
23 personal, with persons outside of our existing household and activities outside of our
24 home with no justification or cause and is repugnant to Article 40.3 accordingly and
25 furthermore the Court shall note that on multiple occasions each of the applicants
26 herein have been stopped twice on transit on the public thoroughfare and not in the
27 commission of any indictable offence, whether in the context of the within
28 legislation or otherwise, and asked by a member of An Garda Síochána the purpose
29 of their journey and requested to prove evidence in the Court thereof or their journey
30 would not be permitted to continue and accordingly we are suffering and continuing
31 to suffer both hardship and harassment on foot of such unconstitutional powers
32 granted by the Minister to An Garda Síochána.

33

34 Article 40.4, "No citizen shall be deprived of his personal liberty save in accordance

1 with law." Such section 4 directly effects each of us and all persons designated
2 applicable persons in prohibiting our transit outside our home save for the reasons
3 prescribed by the Minister and thereby constitute an unlawful detention by the
4 Minister of each of us and all applicable persons by effecting a de facto house arrest
5 of each of us in our place of residence and is repugnant to Article 40.4 accordingly.
6

7 Article 40.6, "The right of the citizens to assemble peaceably and without arms. The
8 right of the citizens to form associations and unions." Section 4 directly effects each
9 of us and all persons designated applicable persons in directly preventing and
10 impeding our right to peaceful assembly, whether for the purpose of peaceful protest
11 reviewing the Minister of Justice in the courts or otherwise in a social context
12 including, but not limited to, persons with whom we are consanguineal relationship.
13 It furthermore directly impedes and presents disassociation in the forming of
14 relationships, either business or personal, with persons not members of a Christian
15 household. It is repugnant to Article 40.6 accordingly.
16

17 Article 40.5.2, "That the citizens (all of whom, men and women equally, have the
18 right to an adequate means of livelihood) may through their occupations find the
19 means of making reasonable provision for their domestic needs." Section 4 directly
20 affects each of us and all persons designated applicable persons in directly
21 preventing and impeding our right to engage in and exercise right to -- it is repugnant
22 to Article 40.6 accordingly.
23

24 And then I would like to refer to section 16 of the act.

25 JUDGE: Section 16 of?

26 MR WATERS: Yes.

27 JUDGE: Which act now?

28 MR WATERS: This is the legislation, the mental health legislation. It refers to
29 mental health.

30 JUDGE: Yes.

31 MR WATERS: Emergency Provisions in the Public Interest COVID-19 Act 2020
32 Part 5, 15 to 22.

33 JUDGE: That's the -- which act is that one? Now, the emergency -- that's the
34 emergency act?

1 MR WATERS: Yes.

2 JUDGE: Yes. And section 16.

3 MR WATERS: Yes, Judge.

4 JUDGE: Okay. That's exigencies of public health emergency, is that it? Sorry,
5 amendments to the Mental Health Act, very good.

6 MR WATERS: Yes.

7 JUDGE: Thank you.

8 MR WATERS: Under the existing legislation the Mental Health Act 2001, upon
9 receipt of in voluntary admission order --

10 JUDGE: Yes.

11 MR WATERS: -- the Mental Health Commission must put the case before a tribunal
12 comprising three persons, appoint a legal representative for the patient, if he does not
13 already have one, and direct in writing a member of the panel of consultant
14 psychiatrists to (1) interview the patient, (2) discuss details of the case, including the
15 proposed treatment, with the consultant psychiatrist who is treating the patient, and
16 (3) review any relevant records. His report is then passed to the tribunal which,
17 having reviewed the facts of the case and determined that all necessary procedural
18 steps have been completed satisfactorily, approve the involuntary admission order.
19 To assist with his review the tribunal may in writing direct that certain persons attend
20 before it on a day and time specified to give evidence. If he decides to appeal the
21 making of the order, the patient may do so within 14 days and have his case
22 reviewed by the circuit court. These procedures are radically transformed by the
23 Emergency Measures in the Public Interest (Covid-19) Act 2020 by dint of which
24 the assessing tribunal is reduced from three members to one. This lone member must
25 be a lawyer with at least seven years' experience in the practice of law. He is not
26 required to have any medical qualifications. The consultant psychiatrist does not
27 have to interview the patient if the exigencies of the public health emergency prevent
28 him from doing so. If this is the case, then the commission can appoint another
29 member of the panel but he too can claim that the same exigencies prevent him from
30 doing so. In fact the tribunal itself can claim the same exigencies prevent it from
31 consulting with a member of the panel. There is no requirement under the 2020
32 legislation to interview the patient or discuss details of the case, including proposed
33 treatment, with the consultant psychiatrist who is treating the patient.

34

1 These draconian, regressive and unnecessary measures have no role or function in
2 addressing or mitigating the situation vis-à-vis COVID-19 which the government has
3 claimed is the basis for the contents of this legislation and --

4 JUDGE: Can you just, sorry for interrupting you, but can you just summarise for me
5 the provision -- the pre-COVID provisions of the Mental Health Tribunals and the
6 post COVID provisions?

7 MR WATERS: Well, that's what I have just done, Judge. I mean --

8 JUDGE: Well, could you just explain that to me again please? Thanks.

9 MR WATERS: Well, the previous regime, if we can call it that --

10 JUDGE: Yes.

11 MR WATERS: -- had a -- there was a tribunal of three persons.

12 JUDGE: Yes.

13 MR WATERS: There was a panel of consulting psychiatrists.

14 JUDGE: Yes.

15 MR WATERS: Who would interview the patient, discuss the details of his place,
16 including treatment and this report was then passed to the tribunal which, having
17 reviewed the facts of the case, and determined that all necessary procedural steps
18 have been completed satisfactorily, approve the involuntary admission order.

19 JUDGE: Yes.

20 MR WATERS: And to assist with its review the tribunal may in writing or could in
21 writing direct that certain persons attend before it on a date and time specified to give
22 evidence. If he decides to appeal the making of the order the patient may do so
23 within 14 days and have his case reviewed by the circuit court. So, the change --

24 JUDGE: So, what are the changes there now?

25 MR WATERS: Well, the tribunal is gone.

26 JUDGE: Yes.

27 MR WATERS: It is now one person.

28 JUDGE: Yes.

29 MR WATERS: It is a lawyer.

30 JUDGE: Yes.

31 MR WATERS: The consulting psychiatrist, there's no requirement that he
32 interviews the patient. Well, he can say that the exigencies of the public health
33 emergency prevent him from so doing.

34 JUDGE: Yes.

1 MR WATERS: Then the commission would then have to appoint another one who
2 can use the same rationale to not interview the person and it seems that in general
3 that this is a deeply regressive initiative --

4 JUDGE: Yes. And is there still a right of appeal to the circuit court?

5 MR WATERS: Pardon?

6 JUDGE: Is there still a right of appeal?

7 MR WATERS: No, I don't believe so.

8 JUDGE: I see. And I think that matter, for some reason I can't put my hands on it
9 just at the moment, I think that matter - yes, I do - was mentioned -- referred to in the
10 affidavit of Ms Bernie Ryan who is a principal officer in the Department of Health
11 and I think she deals with that towards the end of her affidavit at paragraph 130 on.
12 Have you had an opportunity to look at that?

13 MR WATERS: No, I haven't, Judge.

14 JUDGE: Right. Well, maybe in due course you will have a chance to look at that.

15 MR WATERS: Yes, Judge. These documents appeared very late on Sunday.

16 JUDGE: Yes.

17 MR WATERS: Sorry, I beg your pardon, on I think Friday evening but --

18 JUDGE: All right.

19 MR WATERS: -- we were in the midst of trying to --

20 JUDGE: Anyway you will have an opportunity to have -- I think it's paragraphs 130
21 on, subject to correction on that. But in that Ms Ryan sets out basically her case on
22 the Mental Health Tribunal Commission but you haven't had an opportunity to see
23 that.

24 MR WATERS: No, I haven't.

25 JUDGE: Well, maybe you will have a look at that then. Thank you.

26 MS O'DOHERTY: We just want to, Judge, refer to the very extreme powers of
27 detention that the Garda Síochána now have.

28 JUDGE: Now, what -- sorry, Ms O'Doherty, what are we looking at now?

29 MS O'DOHERTY: We are looking at section 7 --

30 JUDGE: Of what?

31 MS O'DOHERTY: I will just get the exact --

32 MR WATERS: It's subsection (7) of section 10 amendments of act 1947.

33 JUDGE: All right. Hold on, hold on. I will just get it out. Section 10 subsection
34 (7).

- 1 MS O'DOHERTY: "A member of An Garda Síochána who suspects ..." --
- 2 JUDGE: Hold on now. Sorry, section 10, wait until I get this out. Now, section 10,
- 3 yes. And subsection?
- 4 MS O'DOHERTY: Well, section 7.
- 5 JUDGE: Section 7.
- 6 MS O'DOHERTY: "A member of An Garda Síochána who suspects with reasonable
- 7 cause that a person is contravening ..." --
- 8 JUDGE: Yes, I have that, yes.
- 9 MS O'DOHERTY: "... or has contravened a provision of a regulation made under
- 10 subsection (1)..." -
- 11 JUDGE: Yes. Now this is in the act, yes.
- 12 MS O'DOHERTY: -- "...that is stated to be a penal provision, may, for the purposes
- 13 of ensuring compliance with the regulation, direct the person to take such steps as the
- 14 member considers necessary..." --
- 15 JUDGE: Yes.
- 16 MS O'DOHERTY: -- "... as the member considers necessary to comply with the
- 17 provision." Now, those four words "As the member considers necessary", I say that
- 18 alone, in my opinion, is utterly unconstitutional.
- 19 JUDGE: So, what -- how does that offend the Constitution?
- 20 MS O'DOHERTY: Well, I don't think these sort of powers have ever been conferred
- 21 upon An Garda Síochána in the past and I believe it is a violation of all constitutional
- 22 principles --
- 23 JUDGE: I know you told me that but --
- 24 MS O'DOHERTY: -- to confer arbitrary powers on an agent of the State --
- 25 JUDGE: -- what article of the Constitution -- I appreciate that but what article of the
- 26 Constitution are you saying that contravenes?
- 27 MS O'DOHERTY: Well, many articles.
- 28 JUDGE: Okay.
- 29 MS O'DOHERTY: But in particular -- all 40. I can read it out if you want, Judge.
- 30 JUDGE: Well, I mean --
- 31 MS O'DOHERTY: I mean I would imagine that -- I mean it is an attack on the most
- 32 fundamental rights of the citizen --
- 33 JUDGE: Yes. I know that --
- 34 MS O'DOHERTY: -- to --

1 JUDGE: -- but I am just trying to identify which right you are saying it attacks.

2 MS O'DOHERTY: Well, I would say it is Article 44.1 but I mean I don't want to
3 narrow it in this regard.

4 JUDGE: Well, do you not think it's unreasonable that if you are saying that this is
5 contrary to the Constitution you could identify the Article which it's contrary to?

6 MS O'DOHERTY: Well, I would have expected that you would be aware of that,
7 Judge, but --

8 JUDGE: Well, I am actually here to listen to you so you tell me.

9 MS O'DOHERTY: I am telling you that we have incredibly strict laws in relation to
10 the imprisonment --

11 JUDGE: Well, Article 44.1 for what it's worth says, "The State acknowledges that
12 the homage of public worship is due to Almighty God. It shall..." --

13 MS O'DOHERTY: No, no, no. 40.

14 JUDGE: Four zero, oh sorry, all right. 40?

15 MS O'DOHERTY: "That no citizen shall be deprived of his personal liberty, save in
16 accordance with law."

17 JUDGE: Yes.

18 MS O'DOHERTY: And then obviously we are looking at habeas corpus. Now,
19 these --

20 JUDGE: Sorry, where does habeas corpus come into it?

21 MS O'DOHERTY: Well, I think it does come into it because --

22 JUDGE: How?

23 MS O'DOHERTY: -- if this particular legislation was to, for example, the grounds
24 that are being given here that a garda can basically decide how he or she is going to
25 proceed, this would appear to be contrary to all of the basic rules --

26 JUDGE: Sorry, Ms O'Doherty, I am just looking at --

27 MS O'DOHERTY: Well, Judge, can I --

28 JUDGE: You refer to habeas corpus, is there anything in subsection (7) that says
29 that the garda can detain a person?

30 MS O'DOHERTY: I will actually read on if you like, Judge, but the point I would
31 like to make -- absolutely. I started off from the outset here saying that a member of
32 An Garda Síochána can take such steps as the member considers necessary. Now,
33 what does that mean in law? Does that mean that a garda can basically make up the
34 law as he or she goes along which is what they are doing out on our streets at the

1 moment and which is the reason why John Waters and I are in here. You know that
2 this is utterly --

3 JUDGE: Well, could you just look at (7) now because, you know, we're going to, as
4 I say, get into the nitty-gritty of this --

5 MS O'DOHERTY: Well, we will get into the nitty-gritty if you wish.

6 JUDGE: Yes. Well, let's just look at (7). It says, "A member of the Garda Síochána
7 who suspects, with reasonable cause, a person is contravening a provision to ensure
8 compliance with the regulation, direct the person to take such steps as the member
9 considers necessary to comply with the provision." Now where in there is there
10 a provision that the garda could bring that person into detention?

11 MS O'DOHERTY: Well, first of all I'd like to just explain the backdrop --

12 JUDGE: Well, no. Just let's look at --

13 MS O'DOHERTY: -- which I am sure you are well aware that we live in a State
14 where --

15 JUDGE: Let's just concentrate -- could we just concentrate on the wording,
16 Ms O'Doherty.

17 MS O'DOHERTY: We can concentrate on --

18 JUDGE: Where does it say in (7) that a garda can detain a person?

19 MS O'DOHERTY: Do you want to read that again?

20 MR WATERS: I think, Judge, really the section, if you read it again, "A member of
21 the Garda Síochána who suspects, with reasonable cause, that a person is
22 contravening or has contravened a provision of a regulation made under subsection
23 (1) that is stated to be a penal provision, may, for the purposes of ensuring
24 compliance with the regulation, direct the person..." --

25 JUDGE: Direct the person. Not detain the person.

26 MR WATERS: Yes. "... take such steps as the member considers necessary to
27 comply with the provision."

28 JUDGE: Yes.

29 MR WATERS: Surely it is not a matter for An Garda Síochána to decide what steps
30 should be necessary to comply with the provision. They should be set down. When
31 you are dealing with --

32 JUDGE: No, that's the point we are dealing with, Mr Waters. Ms O'Doherty has
33 submitted to the Court that effectively subsection (7) contravenes Article 44 which
34 deals with habeas corpus which would indicate that people can be taken wrongfully

1 into detention and she has relied on subsection (7). Now, there doesn't seem to be
2 anything in subsection (7) that deals with that.

3 MR WATERS: Well, there are multiple other articles, Judge. There are multiple
4 other articles in the Constitution --

5 JUDGE: All right, okay.

6 MR WATERS: -- Judge, which are really offended by this. Article 40 virtually in
7 its entirety. All of the fundamental rights of citizens are at play in this particular
8 provision.

9 MS O'DOHERTY: I have been unlawfully detained, Judge, myself in recent weeks.
10 I have been held up at check points, even though I am not being questioned under the
11 Road Traffic Act, I have been detained personally. Now, you know that our habeas
12 corpus laws are very, very clear, I don't need to be in a garda station, Judge, to be
13 unlawfully detained. When a garda has no right to detain me, he does not suspect me
14 of having committed any crime, this is false imprisonment, Judge. It doesn't matter
15 if it happens --

16 JUDGE: When a garda stops you -- just leave aside COVID legislation --

17 MS O'DOHERTY: It doesn't matter if it happens on the side of a road.

18 JUDGE: -- when a garda stops you and asks you is this car insured, so obviously
19 you have to stop the car and to talk to the guards; isn't that right?

20 MS O'DOHERTY: Well, no. The first question I will do --

21 JUDGE: Is that right? No?

22 MS O'DOHERTY: What I will do is, a person who has a vague idea of the law, you
23 may disagree with that, is he first of all must mention the legislation under which he
24 is questioning me.

25 JUDGE: Yes.

26 MS O'DOHERTY: Right. If he proceeds with the Road Traffic Act fair enough but
27 --

28 JUDGE: But, I'm sorry, I am actually coming --

29 MS O'DOHERTY: -- in these instances he is not.

30 JUDGE: I'm sure we wouldn't disagree on that but really what I am coming to the
31 fundamental point is that if a guard stops you and asks you a question, say are you
32 taxed, is your car taxed or is it insured, that whilst you are answering that question
33 that amounts to an act of detention?

34 MS O'DOHERTY: That is under the Road Traffic Act. Garda, you know that the

1 check points that are in every single town, village --

2 JUDGE: All right.

3 MS O'DOHERTY: -- city of our country at the moment, in every housing estate
4 harassing law-abiding citizens, are not there for the purposes of the Road Traffic Act.
5 They are there for the purposes of a law which we consider to be utterly repugnant to
6 the Constitution --

7 JUDGE: Yes, I know. I appreciate that point.

8 MS O'DOHERTY: -- and that is the COVID legislation.

9 JUDGE: Yes.

10 MS O'DOHERTY: So, I am personally, we are here four weeks -- three weeks on
11 arguing that we have locus. I have personally been unlawfully detained, not as
12 a result of the Road Traffic Act, I have a spotlessly clean licence and I had, as I said
13 -- I mean the last day we were coming down here a sergeant instructed a garda to
14 stand in front of my vehicle while we were on the quays. She actually instructed her
15 colleague to do that, Judge. This is outrageous. I told them we are going to that
16 building across the road to fight a case --

17 JUDGE: Ms O'Doherty, at this stage I think --

18 MS O'DOHERTY: -- and her response --

19 JUDGE: -- we really should be concentrating on why we are here which is your
20 application seeking leave for judicial review. So, maybe we should go back and look
21 at that.

22 MS O'DOHERTY: I want to state on the record, because I don't think it's clear to the
23 Court, that unregulated detention is not and cannot be deemed to be constitutional.

24 JUDGE: Yes, okay.

25 MS O'DOHERTY: This is a deprivation of my liberty. This garda was very clear
26 that I was not being questioned under the Road Traffic Act. So, I think we are trying
27 to save the State from a tsunami of cases that will be taken against it.

28 JUDGE: Yes, all right. So, effectively what you are saying is that no matter what
29 legislation it is, if a guard stops you and asks you a question, you are being detained.

30 MS O'DOHERTY: Unless he has -- he has got to have reason.

31 JUDGE: Or she I should say, sorry, yes.

32 MS O'DOHERTY: To suspect me of a crime.

33 JUDGE: I see, okay.

34 MS O'DOHERTY: This is harassment. These are the actions of a police state.

1 JUDGE: Okay.

2 MR WATERS: I think, Judge, if you make a comparison between what is provided
3 for in this piece of legislation and what happens under the Offences Against the State
4 Act or the Criminal Justice Act 1984 or in relation to drunken driving where there is
5 a responsibility on, drunk driving accusations, on the garda to appoint somebody to
6 take care of the prisoner and so forth. This is entirely at odds with the entirety of the
7 responsibilities which are placed on Garda Síochána normatively in these situations
8 where they are taking people into detention and I think in that sense, you know, it's
9 possibly unprecedented and may well could be described as actually having ripped
10 up every right that was being established since Magna Carta. This is like not --

11 JUDGE: Do you not think we are getting a little rhetorical now at this stage?
12 Should we not really be concentrating on your submissions?

13 MR WATERS: Well, we are concentrating -- Judge, with respect, I mean these --
14 you see, Judge, the people out there, this is a really dramatic situation and I don't
15 think that the State understand what we are facing here. We are facing an imminent
16 crisis unprecedented in Ireland in its independence. An economic collapse that could
17 take us back to 1929 with all the attendant consequences that can be predicted and
18 projected arising from that. People are absolutely terrified when they are stopped by
19 An Garda Síochána. They are asked questions which should not be asked of any
20 citizen. A free citizen of a republic. Where they are coming from, where they are
21 going and so on. These -- it is not the case that we are talking here about some
22 moment of normative modification of existing practices. These are entirely new and
23 arbitrary powers which are being extended to An Garda Síochána and they are
24 indeed using them in that way and indeed, you know, there have been many cases of
25 people asking, and we have had witness testimony of this, of asking the gardaí in
26 question to cite the name of the legislation that he was using.

27 JUDGE: I think what we are going to do, Mr Waters, I think we probably -- you
28 have certainly set out your case concerning the constitutionality of the various
29 provisions.

30 MR WATERS: Yes, Judge.

31 JUDGE: But I think what we should now look at is the threshold which you have to
32 meet for the purposes of this court granting you judicial review -- leave to seek
33 judicial review and, as you know, you have to establish an arguable case.

34 MR WATERS: Yes, Judge.

1 JUDGE: Okay. Now, I am sure you have read the submissions from both the
2 respondent and the notice parties and in the course of those submissions they have
3 effectively set out the case law which says what is or is not an arguable case; isn't
4 that right?

5 MR WATERS: Yes, Judge.

6 JUDGE: So, what do you say to -- I mean you appreciate there are I think effectively
7 three decisions on the matter. There is G v. Director of Public Prosecutions, Esmé v.
8 Minister for Justice and Degrane v. Minister for Justice and I think it would be
9 worthwhile if you looked at those decisions and see do you meet that test. So, could
10 we just look at maybe those decisions?

11 MR WATERS: Well, if you wish to put those points to me, Judge, I will try to
12 address them, yes.

13 JUDGE: Well, you have seen I think in the submissions --

14 MR WATERS: Yes, Judge.

15 JUDGE: We will start with the submissions from the respondents and in the course
16 of those submissions they deal with the case of G v. DPP. So, maybe we will start
17 with that one and see what you have to say about that.

18 MR WATERS: Certainly, Judge.

19 JUDGE: Just wait until I get those decisions. And I don't seem to have them before
20 me just -- hold on. Actually I do have them. Yes, sorry, I apologise, I have them.
21 Now, I think they are dealt with in the submissions at pages 8 on. So, maybe we will
22 have a look at that. Yes.

23 MR WATERS: Well, I think the applicants -- or the respondents have alleged that
24 the statement is deficient insofar as it has not particularised the assertions of fact.
25 I don't accept that. I think that we have set out a very substantial outline of the
26 breaches of the Constitution that are at stake here which, as we have said in our
27 statement of grounds, are bearing down upon the public in general and, as we have
28 outlined in our affidavits, are bearing down on us personally in multiple ways and for
29 that reason I think that we have established that we have a substantive case in
30 relation to our standing and our --

31 JUDGE: Yes. Could I just ask you to look at page 9 of the submissions from the
32 notice party that deals with the decision of Esmé v. Minister for Justice and law
33 reform and the following page, page 9, there is a passage from that judgment and I'd
34 just like to get your comments on that and the passage reads, "Any issue in law can

1 be argued: but that is not the test. A point of law is only arguable within the meaning
2 of the relevant decisions if it could, by the standards of a rational preliminary
3 analysis, ultimately have a prospect of success. It is required for an applicant for
4 leave to commence judicial review proceedings to demonstrate that an argument can
5 be made which indicates that the argument is not empty. There would be no filtering
6 process were mere arguability to be the test without, at the same time, taking into
7 account that trivial or unstatable cases are to be excluded." And so on. "The thrust
8 of the argument indicates that reasonable prospects of success have been
9 demonstrated. It is still required to be shown that a prima facie legal argument has
10 been established." And it goes on, "This is the filter which the leave application is
11 designed to be in order to ensure there's a sufficient reason to disrupt administrative
12 decisions and to litigate them."

13 MR WATERS: Well, I think that there is a judgment -- the G v. DPP has established
14 that it is not necessary to show that you have a chance of winning the case. Judge
15 Denham in that decision made clear that it wasn't necessary. That was not the test of
16 -- that she said the test was actually a very light one and that we simply need to show
17 that a case can be advanced that is arguable. I think in lay person's terms I would say
18 that that's a case that makes for a debatable question to be placed before the Court.

19 JUDGE: Yes.

20 MR WATERS: Yes, I will read from -- she cites from a case --

21 JUDGE: Sorry, what are you referring to because G was --

22 MR WATERS: I am referring to the judgment in G v. DPP.

23 JUDGE: I don't think that -- yes.

24 MR WATERS: And she cites a judgment from Lord Diplock in R v. inland Revenue
25 Commissioners ex parte National Federation of Self-employed and Small Businesses
26 Limited [1982]

27 JUDGE: Is there a book of authorities?

28 MR WATERS: Where she cites --

29 JUDGE: Sorry, sorry, is there a book of authorities in --

30 MR McCANN: Yes, Judge.

31 JUDGE: Yes. I wonder could I just -- is G in that.

32 MR McCANN: We will hand it in. I will hand that into you now, Judge.

33 JUDGE: Yes. Thank you. Sorry, thank you very much. Sorry, you are referring to
34 G; isn't that right?

1 MR WATERS: Yes. I am reading from the judgment in which Judge Denham
2 quotes from Lord Diplock in the case I have mentioned, R v. Inland Revenue
3 Commissioners.

4 JUDGE: Oh sorry, yes. Well, you must have a different G -- oh hold on now,
5 maybe you don't. Oh sorry, yes, Justice Denham's judgment, sorry, yes.

6 MR WATERS: Yes, correct.

7 JUDGE: What page is it on? I have it here.

8 MR WATERS: I think this is very germane to what is going on in this court today,
9 Judge --

10 JUDGE: Yes, yes.

11 MR WATERS: -- if I may say so.

12 JUDGE: Yes.

13 MR WATERS: Lord Diplock says, "The whole purpose of requiring that leave
14 should first be obtained to make the application for judicial review would be
15 defeated if the Court were to go into the matter in any depth at that stage."

16 JUDGE: Yes.

17 MR WATERS: "If, on a quick perusal of the material then available, the court thinks
18 that it discloses what might on further consideration turn out to be an arguable case
19 in favour of granting to the applicant the relief claimed, it ought, in the exercise of a
20 judicial discretion, to give him leave to apply for that relief. The discretion that the
21 court is exercising at this stage is not the same as that which it is called on to
22 exercise when all the evidence is in and the matter has been fully argued at the
23 hearing of the application."

24 JUDGE: Yes.

25 MR WATERS: And Judge Denham then goes on, "I am satisfied that a light burden
26 of proof required applies in this jurisdiction at the initial ex parte stage as stated by
27 Lord Diplock. It is a preliminary filtering process for which the applicant is required
28 to establish a prima facie case. Ultimately on the actual application for judicial
29 review the applicant has an altogether heavier burden of proof to discharge. That
30 latter burden of proof is not before this court but clearly at that stage reasons for the
31 delay, which may include factors such as the relative ages of the complainant at the
32 time of the alleged offences, the question of any dominion the applicant may have
33 had over them, and further matters about which are concerned becoming more and
34 more aware in relation to charges such as are laid here, may be factors among others

1 for determination." And I think an analogy can be drawn between that description of
2 the case that Justice Denham was talking about and the case here that, you know, the
3 questions that you have raised, and they are very much germane and will be very
4 much germane to the substantive hearing of these matters to do with the evidence
5 that was available to the government, whether or not they were misled, whether or
6 not there was exaggeration of models, statistics and so forth and projections. All of
7 that is for the full hearing. What we need to establish here is not -- we do not need to
8 show I believe, according to this judgment, that we have -- that we will for certain
9 win the case. We do not need to win the case here. We need simply to raise
10 sufficient questions about the constitutionality of these matters to raise a question
11 about these and to raise concerns about these which I believe we have succeeded in
12 doing and therefore I would suggest that this test is, as Judge Denham said, a light
13 one and that is appropriate for an application that began and might well have
14 continued ex parte. It would have finished there in the vast majority of cases as
15 I understand it when simply leave for judicial review would have been granted at that
16 first hearing. So, we are now on our fourth hearing and we are now almost in a full
17 trial of these issues.

18 JUDGE: Yes. Can I ask you, Mr Waters, just to comment on the passage from the
19 judgment of the Chief Justice, it is on page 377 going into page 378 of the report if
20 you have it there?

21 MR WATERS: I don't know that I have that -- which --

22 MR McCANN: Sorry, we handed in a book of authorities to the applicants.

23 JUDGE: Yes. It's at tab 5.

24 MS O'DOHERTY: Tab 5.

25 JUDGE: Yes.

26 MR WATERS: Yes, Judge. And this is the judgment of Director of Public
27 Prosecutions?

28 JUDGE: Yes, it's G v. DPP and it's the judgment of the then Chief Justice and at
29 page 377 going into 378.

30 MR WATERS: Yes, Judge.

31 JUDGE: He says, bottom of the page, "I am satisfied it is desirable for considering
32 specific issues" and so on. "An applicant ..." -- sorry, he proceeds, "An
33 applicant must satisfy the court in a prima facie manner by the facts set out in his
34 affidavit and submissions made in support of his application of the following

1 matters:- (a) That he has a sufficient interest." So, that's the locus standi point. "(b)
2 That the facts averred in the affidavit would be sufficient, if proved, to support a
3 stateable ground for the form of relief sought by way of judicial review."

4 MR WATERS: Yes, Judge.

5 JUDGE: Now, we earlier this afternoon discussed the facts as set out in your
6 affidavit and I thought we were agreed that effectively your narrative stops on the
7 11th or the 12th of March. So, do you have facts on your affidavit?

8 MR WATERS: Well, we have our own evidence of what is, in addition to what is in
9 our affidavit, we have our own evidence as applicable persons and as the litigants in
10 this case.

11 JUDGE: Yes. But I mean would you agree then that it seems to be the case, and
12 I know Ms O'Doherty has referred to scientifically fraudulent information and has
13 questioned that the figures were wrong, the infection was not as pervasive as the
14 government indicated and the mortality figures were all wrong, that's not in your
15 affidavit anywhere. So, you --

16 MR WATERS: Well, it all --

17 JUDGE: It seems --

18 MS O'DOHERTY: Judge, this is an evolving situation --

19 JUDGE: Could you just listen to the question please? Please listen to the question.
20 It seems or is it the case that in fact you don't meet (b) because you haven't in fact
21 averred facts in your affidavit.

22 MR WATERS: Oh I think we have, Judge.

23 JUDGE: Oh right.

24 MR WATERS: Many, many facts indeed. About the enactment of this legislation,
25 the manner in which it was enacted.

26 JUDGE: Well, we will come to that in a moment. Now, that's a separate matter.

27 MR WATERS: Yes. The consequences of it out there in society, in the streets and
28 byways of Ireland. The activities of An Garda Síochána. We have referred --
29 alluded to multiple aspects of this case of this situation and for that reason I think
30 that it would be extraordinary if, on the basis of alerting the Court to the grave
31 unconstitutionality of this legislation, that we would be required to detail at this point
32 every single --

33 JUDGE: But it appears to be the case that --

34 MR WATERS: -- fact that we might seek to reply upon in our evidence in a full

1 hearing.

2 JUDGE: None of these matters which you have just told me about are averred to in
3 your affidavit.

4 MS O'DOHERTY: Judge, as I said this is an evolving situation.

5 JUDGE: Yes.

6 MS O'DOHERTY: And you know that it is. I mean many of you go about your
7 business every day and because you work for the State and you have your papers, as
8 it were, reminiscent of Nazi Germany in fact that people now in Ireland have to go
9 about their business carrying papers, you are not subjected to the same levels of
10 harassment that the average Irish person is.

11 JUDGE: It is coming up to 4 o'clock, Ms O'Doherty, and, you know, I really think
12 we have gone well past a stage for speeches. So --

13 MS O'DOHERTY: It is far from being a speech, Judge. This is the last place that
14 we want to be at the moment and I really, really reject that and I find it insulting.
15 Judge, we have told you today that there are citizens who carry Irish passports
16 travelling into the Republic of Ireland from Northern Ireland who are not subject to
17 the COVID-19 legislation, unlike citizens who live here. How can that be
18 constitutional, Judge? I would like you to explain. I can't see how that --

19 JUDGE: Now, in terms of the --

20 MS O'DOHERTY: How citizens can be treated differently in this regard. Many
21 citizens travelling down have Irish citizenship.

22 JUDGE: As I indicated to you, I wanted to do the thing, your application, in two
23 sections. Firstly the constitutionality of the regulations and the act and then move on
24 to the manner in which you say the legislation was passed in the Houses of the
25 Oireachtas. Now --

26 MR WATERS: Judge, if I can address the point -- I beg your pardon, Judge.

27 JUDGE: Sorry, yes, of course.

28 MR WATERS: Well, Judge, I do think, with due respect, I do think that you are
29 applying to these points here an analysis or a meaning to the concept of facts which
30 is more pertinent and more relevant for a full hearing than it is to an ex parte
31 application for judicial review based on an overarching situation which, as
32 Ms O'Doherty has said, was in constant flux and in which the consequences of which
33 were in full view, in plain sight of every citizen of this country and indeed every
34 judge and every lawyer, every journalist, every politician is aware, this is

1 unprecedented. Like it would be absolutely I think incorrect to suggest that it is
2 some kind of game which we are playing that we must have set down every single
3 thing on which we expect to reply upon in a full hearing at this point when in fact
4 what we are here for is a clear and manifest breach of the Constitution, a suspension
5 of the Constitution.

6 JUDGE: What I was hoping to do --

7 MR WATERS: The Constitution applies -- I'd like to make an additional point in
8 relation to this, Judge.

9 JUDGE: Yes.

10 MR WATERS: That it seems clear, we alluded before to Article 28.3.3 which is the
11 article in which it is permissible for a government to declare a state of emergency.

12 Now, the State claims that their clients are not reliant upon this article.

13 JUDGE: Yes.

14 MR WATERS: Well, then we have to ask what are they reliant upon. If they
15 believe -- if their client believes that it is possible to suspend the Constitution
16 without declaring a state of emergency and still using the word emergency
17 throughout its legislation and using the word emergency in every bulletin, every
18 speech, every newspaper article, drumming this into the heads of people fraudulently
19 to give them the impression that there is a legitimate emergency --

20 JUDGE: I think again, Mr Waters, you know, you are beginning to drift into making
21 speeches rather than submissions.

22 MR WATERS: Well, I think a speech is appropriate in this situation, Judge.

23 JUDGE: I see, all right.

24 MR WATERS: Because these are matters which are not legalistic, cannot be dealt
25 with in mere legalistic concepts.

26 JUDGE: Well, I have to apply the Constitution as you say.

27 MR WATERS: Yes, I do.

28 JUDGE: And just on the point of emergency, Article 24 refers to public
29 emergencies.

30 MR WATERS: Only in passing, Judge.

31 JUDGE: Oh I see, all right. What do you mean by that, only in passing?

32 MR WATERS: Well, it's got to do with the Seanad and the abridgement of the
33 deliberation time of the Seanad as I recall it, Judge.

34 JUDGE: I see.

1 MR WATERS: That's what Article 24 refers to.

2 JUDGE: Well, it says, "By reason of the existence of a public emergency, whether
3 domestic or international ..." and so on.

4 MR WATERS: Yes.

5 JUDGE: How can you say that's only in passing?

6 MR WATERS: Well, let me tell you a little bit of the history of this, Judge, because
7 it is very pertinent that in 1939, as I mentioned before, when the question of an
8 emergency was mooted and at the time the Article 28.3.3 limited the declaration of
9 emergency, state of emergency to wars and armed rebellions in which the State itself
10 was a belligerent, that was the understanding that was arrived at by the politicians
11 and officials at that time who were making that decision and they took the situation
12 so seriously that they actually effected an amendment to amend it to include conflicts
13 in which the State was not necessarily a belligerent but which the State could be
14 imperilled by. Now, they did not -- they did at a point, I am familiar with this from
15 --

16 JUDGE: Mr Waters, I am not terribly sure that this is of any great assistance to me
17 --

18 MR WATERS: Well, I think it is, Judge.

19 JUDGE: -- in the decision I have to reach.

20 MR WATERS: This is the core of it.

21 JUDGE: I see. All right.

22 MR WATERS: This is the core of it.

23 JUDGE: Core of it, okay.

24 MR WATERS: Yes.

25 JUDGE: All right.

26 MR WATERS: It is, Judge. In Mr Gerard Hogan's book about the origins of the
27 Constitution he outlines in detail this whole series of events and he makes clear that
28 there was sustained discussions between officials and politicians and other interested
29 parties, lawyers et cetera, as to whether at that time it was possible to broaden the
30 scope of Article 28.3.3 to include any kind of emergency and it was decided not to
31 take at that course. So, this is clear that the Constitution allows for one category of
32 emergency so called.

33 JUDGE: Well, I think it allows for a category of emergency in respect of which the
34 constitutional rights, save one, doesn't apply. Isn't that what it does?

1 MR WATERS: It may well do but to give the impression first of all to the public
2 that we were in a state of emergency, and I think that was the impression which was
3 --

4 JUDGE: I mean there are, I'm sure you'd accept, are there not emergencies that face
5 the State other than war?

6 MR WATERS: There are and this is precisely the point that was being considered at
7 the time.

8 JUDGE: I mean just think about the --

9 MR WATERS: And it was considered that it would be inadvisable because it would,
10 for that purpose, leave open the possibility that emergencies could be declared for
11 virtually any reason and that it would be a very dangerous road to embark upon.

12 Now, that was the reason --

13 JUDGE: Yes. I mean I don't think there's any suggestion that by calling it an
14 emergency in any sense that, talking about the COVID situation, that in any sense
15 the Constitution doesn't continue to apply. That's not the case at all.

16 MR WATERS: Well, I think, Judge, if we, as we have outlined --

17 JUDGE: And I am terribly sure what the relevance of Article 28.3.3 is.

18 MR WATERS: It is relevant insofar as that is where -- there are four mentions of the
19 word emergency in the Constitution and two of them are in Article 28.3.3.

20 JUDGE: Mm hmm.

21 MR WATERS: And that is the place, the only place, in where the concept of a state
22 of emergency is permitted.

23 JUDGE: As I say I mean I don't understand how Article 28.3.3 assists --

24 MR WATERS: Well, I would put it to you --

25 JUDGE: -- your case.

26 MR WATERS: Can I put it to you this way, Judge, there was an intervention last
27 week by Lord Sumption, the former judge of the Supreme Court, and it was put to
28 him that the measures being introduced in the United Kingdom, which are very
29 similar in their reach and general tenor as our measures, it was put to him that these
30 were the worst measures since World War II and he says that is not correct. He said
31 they are much worse than that.

32 JUDGE: Right.

33 MR WATERS: Nothing in the measures that were introduced in World War II he
34 said were anything like these in terms of their gravity and reach and he said that this

1 is in fact -- he said it was the worst -- the most extreme set of measures ever
2 introduced --

3 JUDGE: Yes.

4 MR WATERS: -- in Britain and I would say the same applies here. This is what we
5 are talking about and this is the relevance of Article 28.3.3 which allows for at least
6 some understanding of what level of risk, what level of gravity is required for an
7 emergency in which the suspension of the constitutional powers is actually implicit,
8 if not explicit.

9 JUDGE: Yes.

10 MR WATERS: And it fails I think to meet that test in a very serious way.

11 JUDGE: All right. In terms of your application about the legislation, have you
12 further submissions on that? I am just trying to gauge the time.

13 MR WATERS: Of course, Judge, yes.

14 JUDGE: Because I propose to sit until -- what I propose to do is, if at all possible,
15 and it's obviously entirely subject to yourselves, so to try and deal with that aspect
16 today and maybe tomorrow move on to the Oireachtas case. So, I propose to sit to
17 half 4. That's convenient for everybody is it?

18 MR McCANN: Thank you, Judge.

19 JUDGE: Yes.

20 MR WATERS: Yes, Judge.

21 JUDGE: Yes, all right.

22 MR WATERS: No, I think that's about as much as we need to say at this point.

23 JUDGE: About the Constitution and the regulations?

24 MR WATERS: I beg your pardon.

25 JUDGE: Sorry, just to be very clear, I mean you have made your submissions, have
26 you, concerning the act --

27 MR WATERS: I have made -- yes, we have made our submissions.

28 JUDGE: Right.

29 MR WATERS: I did want to emphasise some aspects of the constitutional --

30 JUDGE: Yes, of course. All right.

31 MR WATERS: The general -- the state of emergency situation.

32 JUDGE: All right.

33 MR WATERS: Because it seems that this is -- if they -- we would say, Judge, that if
34 it is the case, given the nature of the powers that have been derived or extrapolated

1 from the Constitution for the purposes of this particular, what is it called, the
2 lockdown -- so, the implications of that are quite staggered if we are to allow it to
3 pass muster I believe because what it means is that if the Constitution is capable of
4 extension in this way it's possible really, without any real basis, any sustained basis,
5 any demonstrable basis, to incarcerate citizens in their homes, to prevent citizens
6 travelling further than a stipulated distance from their homes, to suspend all
7 restrictions previously set out in various statutes and regulatory schedules assumed to
8 apply to the entitlement of members of An Garda Síochána to stop and question
9 citizens in public places and interrogate them about their movements. Under threat
10 of punishment by a fine or term of imprisonment. To summarily close down
11 businesses, trading premises, parks, scenic areas, beaches and other premises and
12 places hitherto understood as offering right of access to citizens without recourse to
13 court applications or warrants of any kind. This -- so that they can simply -- you
14 have seen many beaches, parks barred up. The most extraordinary sight. People are
15 told to move along from park benches if they are sitting reading a book. I mean this
16 is an intrusion at the most intimate level of human life. So, I think that in
17 constitutional terms it is literally unprecedented that anything like -- nothing like this
18 ever happened before. I think Lord Sumption is actually correct in this. You know,
19 citizens can be ordered purchasing items in shops or similar premises, that they may
20 only purchase items conforming to specific criteria to be decided it seems almost on
21 an arbitrary basis by garda officers. I could tell you various instances of that but, you
22 know, for example, a friend of mine was prohibited in a shop from buying paint to
23 paint a fence. He was told to return it to the shop. Whereas if he had bought a gallon
24 of alcohol he would be quite --

25 JUDGE: I think even you at this stage must appreciate that talking about the
26 experiences of your friends, you know, if you are going to rely on that, that should
27 have been on affidavit.

28 MS O'DOHERTY: Well, no, because, Judge, this as we say is an evolving situation.

29 JUDGE: Right.

30 MS O'DOHERTY: And I really do think --

31 MR WATERS: I am not -- sorry, Judge. I am not relying on it. I am simply trying
32 to illustrate --

33 JUDGE: All right. Very good. Well, that's fine.

34 MR WATERS: -- the points I am making to you to persuade you -- to help you to

1 comprehend what -- because I am not certain that you understand the gravity of the
2 situation that faces us and that alarms me greatly because this is I think an
3 unprecedented situation and I can assure the Court that come two/three months down
4 the line there will be serious questions asked about this entire edifice of legislation
5 and what happened and why nobody spoke up and why it was left to two citizens,
6 two lay people, to take an initiative that should have been taken --

7 JUDGE: Is there any significance in what I think is the case that this legislation has
8 a sunset provision in it insofar as I think the act goes on the 9th of November?

9 MS O'DOHERTY: Well, it goes on till November but we have very serious concern,
10 looking at previous legislation around the world, for example, such as the Patriot Act
11 in the United States, where this legislation continued in existence and that is why we
12 are seeking a declaration of unconstitutionality --

13 JUDGE: Yes. But I mean really the question on my mind really would be this that,
14 as I think you are all agreed, this is a matter of proportionality and in terms of
15 proportionality, should the Court be taking into account the fact that this legislation
16 lapses on the 9th of November?

17 MR WATERS: I don't believe so, Judge, for the following reason.

18 JUDGE: All right.

19 MR WATERS: That this legislation has established a precedent and a pattern in
20 which -- it's almost like a training exercise on which the public is being conditioned
21 to behave in a way and to accept as normal situations which are grossly abnormal
22 and to accept the imposition of these laws and it strikes me that if this is not deemed
23 to be unconstitutional, if the courts do not intervene to ensure that this is quite clear
24 to the authorities, to the political authorities that this has exceeded the bounds of the
25 Constitution, then the gate would be open in the future to restore these kinds of
26 measures at the drop of a hat.

27 JUDGE: All right.

28 MR WATERS: And you can only expect from that that they will escalate in their
29 gravity and their seriousness and force --

30 JUDGE: But isn't that just speculation -- isn't that speculation?

31 MR WATERS: Well, indeed but I think it's very informed and educated speculation
32 because there is a background to that, to this whole thing, which we will hope to go
33 into in the evidence we shall give to the full hearing if it happens concerning the
34 nature of the information that's coming to, where it's coming from, the nature of the

1 instructions that are being given, who is giving them, who is accepting them, what
2 level of verifications have been applied to them, if any, and so on. And so this
3 would cause I think anybody who becomes aware of it in Ireland a very grave
4 concern about the fact that this has been allowed to go unchecked and can at any
5 time be reintroduced. As I said earlier, it is possible to -- if you look at the figures
6 that are now emerging, and we haven't yet seen the final figures, but it looks very
7 much that they are being shaved every day.

8 JUDGE: Yes. No, you have mentioned the point that you don't accept the figures or
9 the statistics, if I can --

10 MR WATERS: I think that there's adequate evidence coming in on a daily basis,
11 Judge, since we lodged this application, there is more and more evidence coming of
12 the -- and here in Ireland, that the figures for mortalities, for fatalities are not reliable.

13 JUDGE: I see.

14 MR WATERS: That the methods of certification are so loose as to render -- and we
15 have seen many instances of --

16 JUDGE: You have certainly made that point to me. In terms of the specifics of the
17 legislation and the regulations, I mean is there anything further you want to put to the
18 Court as to -- in support of your case that these provisions are unconstitutional?

19 MS O'DOHERTY: Well, with every passing day, Judge, we are seeing how
20 scientifically fraudulent the State's lockdown scenario is and, you know, I do really
21 feel very disturbed at a point you have raised several times, Judge, suggesting that
22 your statement of grounds made three weeks ago, almost four weeks ago, is set in
23 stone and that's it, that whatever we said there three weeks ago that's the end of the
24 story. No, it isn't, Judge, because since that period many courts around the world
25 have deemed the lockdown to be very dubious, if not unconstitutional, and they have
26 been able to deal with their cases like that because they were --

27 JUDGE: Yes. What courts are these?

28 MS O'DOHERTY: They are -- well, there have been cases --

29 JUDGE: Well, you put -- what courts were those?

30 MS O'DOHERTY: -- in the United States, in Germany.

31 MR WATERS: The Supreme Court of Mississippi is one --

32 JUDGE: I see.

33 MR WATERS: The Supreme Court of the Czech Republic in Prague.

34 JUDGE: I see, all right.

1 MR WATERS: There are several courts also in Germany.

2 MS O'DOHERTY: This will all form part of our application but we do, you know,
3 want to draw attention to the expeditious matter -- nature of the way those cases were
4 dealt with and here we are, our fourth hearing, having presented ample evidence that
5 --

6 JUDGE: Yes.

7 MS O'DOHERTY: But, you know, I am not going to be stopped in relation to the
8 next point that I want to make and I don't want you to say, Judge, that I didn't
9 mention this in the statement of grounds because there's many points that we have
10 made over the last three hearings since our initial first hearing that are new because
11 of the evolving situation.

12 JUDGE: Yes.

13 MS O'DOHERTY: For example, one of the latest more deranged, I have to call
14 them, instruments that are going to be used against citizens, for example, and I want
15 to use this to stress how unscientific their methods are, people now who are, for
16 example, members of a golf club or a tennis club in the coming weeks I believe will
17 be allowed to go back to their sports providing that they live within five kilometres
18 of their club. Now, where is the scientific basis to say that if you live within five
19 kilometres and let's say a half a kilometre from your club you are more of a danger to
20 the public? They are making it up as they go along, Judge, and this is why it is
21 absolutely fundamental that you see this as an evolving situation. They are plucking
22 these, you know, so called protections out of the sky. Many members of golf clubs
23 and tennis clubs and other sporting clubs who are really affected at this time of year
24 because they like to be out doing their sports and they are the least of our worries
25 because we are more concerned about the very vulnerable citizens in very deprived
26 communities who are facing daily harassment by the gardaí.

27 JUDGE: Yes.

28 MS O'DOHERTY: But these citizens will be taking serious actions against the State.

29 JUDGE: All right.

30 MS O'DOHERTY: This is out and out discrimination to say that because you live
31 five and a half kilometres from your golf club you cannot go but because you live
32 five kilometres, I can't wait to see the science behind this.

33 JUDGE: Yes. Well, maybe you are right. Maybe there will be actions concerning
34 that but let's just deal with what's before me.

1 MS O'DOHERTY: Well, you have to protect the taxpayer, Judge.

2 JUDGE: Is there anything further on the legislative regulatory side?

3 MR WATERS: Other than what is in our documents, there's nothing, Judge.

4 JUDGE: All right, okay.

5 MR WATERS: That we want to --

6 JUDGE: Well, then what I propose to do is I am going to adjourn the matter until
7 tomorrow at 11 and at that point maybe we could move on to the notice party's
8 involvement, that's the Dáil Éireann, Seanad Éireann and the Ceann Comhairle,
9 okay. So, 11 tomorrow.

10 MR McCANN: Thank you, Judge.

11 JUDGE: Very good. Thank you very much. Thank you.

12

13 Court adjourned

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1 Certified to be a complete and correct transcript of the record of the proceedings
2 herein*:

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10 Office Manager

11 Epiq Europe Limited (Ireland)

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13 (*The absence of a dedicated logger in court to provide a detailed log may result in
14 speaker names being omitted or unconfirmed.)

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