

Bill No: 2020 271 JR

THE HIGH COURT
BEFORE THE HONOURABLE MR JUSTICE MEENAN

6 May 2020

GEMMA O'DOHERTY AND JOHN WATERS

v.

MINISTER FOR HEALTH & OTHERS

and

CEANN COMHAIRLE, DÁIL ÉIREANN AND SEANAD ÉIREANN

For the Applicants:

Mr J Waters, Lay Litigant

Ms G O'Doherty, Lay Litigant

Counsel for the Respondents:

Mr P McCann, SC

Mr G Meehan, BL

Counsel for Notice Parties

Mr F Kieran, BL

Gemma O'Doherty and John Waters v. Minister for Health & Others
6 May 2020

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JUDGE: Now, Mr Waters.

MR WATERS: Good morning, Judge.

JUDGE: Good morning.

MR WATERS: We have a rather urgent application to make, Judge. It relates to the matter we raised yesterday about the publication, non-publication of the regulations. The revised regulations have not yet been published in any official form.

JUDGE: Yes.

MR WATERS: There had been no edition of *Iris Oifigiúil* since Friday even though in the normal course of events it is published on Tuesdays and Fridays and there is no notice on any official governmental website that we can find indicating the nature of the new regulations which have only been informally announced --

JUDGE: Yes.

MR WATERS: -- by various media outlets. So therefore it would appear to us, Judge, that gardaí who are stopping people at the moment, questioning them, are actually acting illegally. My colleague Ms O'Doherty was stopped twice this morning already by members of An Garda Síochána.

JUDGE: Right.

MR WATERS: So we wish to get the guidance of the Court with regard to what order we might seek with that in mind because it does appear to be, while not part of our pleadings at this moment, entirely germane and indeed central to the questions that we are raising here.

JUDGE: Very good. Well, you have raised what you consider to be an issue that is the non-publication of the regulations and what effects that may or may not have on the validity of those regulations and as you have also observed correctly, this does not form part of the application which is before the Court. So should you wish to, you may of course bring a separate application in respect of the non-publication of the regulations and do so in the usual way.

MS O'DOHERTY: Well, Judge, I think it's actually a lot more serious than that.

JUDGE: Well, Ms O'Doherty, I've made my ruling on the matter --

MS O'DOHERTY: Well, Judge, I want to --

JUDGE: I have made my ruling on the matter. I have made it expressly clear to you.

MS O'DOHERTY: Judge, I have been subjected to criminality at the hands of An

1 Garda Síochána this morning --

2 JUDGE: Excuse me, the publication of these regulations does not form part of what
3 is before me, but you are perfectly free to bring another application in that regard
4 should you so wish.

5 MS O'DOHERTY: Can we seek injunctive relief? Can we seek an injunction
6 against An Garda Síochána?

7 JUDGE: Thank you. Could we possibly proceed with the application that is before
8 the, Judge.

9 MR WATERS: Very well, Judge.

10 JUDGE: Thank you.

11 MS O'DOHERTY: Sorry, I am not happy about this, Judge. I have been
12 interrogated by An Garda Síochána twice this morning. I was asked where I was
13 going and when I said I was going to court --

14 JUDGE: Ms O'Doherty, I have made my ruling and I would like to proceed with the
15 application that is before the Court. Thank you.

16 Now, Mr Waters I think I think at the conclusion of yesterday's hearing, I think, and
17 correct me if I'm wrong, you had reached the conclusion of your submissions
18 concerning the constitutional validity of the regulations and the statute, and we are
19 going to move on to the issue as to the notice parties, that's the Ceann Comhairle,
20 Dáil Éireann and Seanad Éireann. I think that's where we were yesterday but I think
21 there was one matter which I think was outstanding and that was the issue of the
22 mental health tribunals. You had indicated that you were contesting the validity of
23 the legislation that amended the operation of those tribunals and I think I pointed out
24 to you that this matter was dealt with at paragraphs 130 on in the affidavit of
25 Ms Bernie Ryan who is a principal officer in the Department of Health and I think
26 you said that you would like an opportunity to have a look at those paragraphs in the
27 affidavit. I don't know if there's any submission you want to make on that, on the
28 issue that arises there.

29 MR WATERS: Not on that particular point, I don't think, Judge.

30 JUDGE: All right.

31 MR WATERS: Can you remind me again what number you are referring to there?

32 JUDGE: Yes, it's as I mentioned to you yesterday it's paragraphs 130 on of the
33 affidavit, I think there's about three paragraphs, of the affidavit of Ms Bernie Ryan.

34 MR WATERS: Yes, Judge, reading them very briefly it appears to me that they are

1 simply attempts to justify the withdrawal of fundamental rights which I do not
2 believe can be justified in any circumstances like this. Especially with a form of
3 legislation like this which impinges on if the diagnosis is to be deemed to be correct
4 on people who are mentally unwell and therefore at a loss with regard to defending
5 themselves and their own rights and freedoms in this situation. I don't see, look,
6 reading through the list of what I would call, I suppose, excuses, justifications, there
7 really don't in my view pass muster in terms of a justification or proportional
8 treatment of the issue. The rights are being withdrawn and it is quite stark in the
9 actual text of the legislation what that means for people in that situation. These laws
10 bring us back in fact longer than my lifetime, nearly 70 years.

11 JUDGE: Yes.

12 MR WATERS: And they undo all of the work that has been done in updating our
13 mental health legislation in that period. I don't really have anything to say other than
14 that about those.

15 JUDGE: I see. There are those obviously general observations, but for example at
16 paragraph 132 the deponent says that, "One of the concerns raised by the
17 Commission was the potential difficulty of conducting section 17 examinations in
18 person. Further to a request to the Department, the Commission sought clinical input
19 from Professor Brendan Kelly who confirmed that section 17 examinations could be
20 conducted remotely via electronic means." Then there's an exhibit. I mean, would
21 you have anything to say directly on that point?

22 MR WATERS: Well I would say, Judge, just as I would say in relation to the issue
23 of removing the public from the courts --

24 JUDGE: All right.

25 MR WATERS: -- that electronic means does not satisfy the requirements of
26 justice --

27 JUDGE: I see.

28 MR WATERS: -- in this situation. I mean, if the state is impinging on the
29 fundamental rights of citizens, it requires to meet very high standards in terms of
30 observing the rules and codes and laws that have been developed over the decades,
31 over the centuries indeed for that purpose and it seems that it's just again
32 symptomatic of the entire package that it seems to really put a very low value on
33 those rights in the first place as though they were something to be diluted, played
34 down and indeed set aside on the basis of other factors which really in other

1 situations would not be tolerable.

2 JUDGE: Yes. Well do you attach any weight to what is deposed to here, that a
3 Professor Brendan Kelly who I assume is fully qualified and is a specialist in this
4 area has confirmed that section 17 examinations could be conducted remotely?

5 MR WATERS: Well, I mean his view is his view.

6 JUDGE: All right.

7 MR WATERS: My view is that is not adequate --

8 JUDGE: Okay.

9 MR WATERS: -- to the situation. Again I repeat that what is at stake here is, you
10 know, the fundamental rule of law, fundamental protections which are there for the
11 citizen who is in this situation would be a prisoner of the state. I don't think that they
12 can be set at a low value in any circumstances whatever or on any advice whatever.

13 JUDGE: Very good.

14 MR WATERS: Thank you, Judge.

15 JUDGE: Sorry, do you want to move on to your case which you are making against
16 the notice parties which I think effectively is your case that the passage of the
17 legislation through the Oireachtas was in some sense infirm?

18 MR WATERS: Yes, Judge, I can outline that. Our case is essentially that at the
19 time that these events were set in train we did not -- there was not in any sense an
20 adequate justification for the measures being implemented, that we were at that
21 point, we are talking now about the 11th to 15th March, at a very early stage in terms
22 of cases and this was, what was being embarked upon was a radical programme of
23 removing fundamental rights from citizens. For that reason we feel, we submit that
24 what is required in this situation was a very exceptional process of verification of
25 due diligence of never before perhaps in the history of the state has the Oireachtas
26 had such a heavy responsibility facing any piece of legislation. Instead we found
27 that this legislation was rushed through with a reduced, radically reduced quotient of
28 representatives in the Dáil and that this was set up in a very strange manner by a
29 letter emanating from the Ceann Comhairle. What is striking on reading through the
30 debates, Judge, is that there's virtual unanimity. They are extraordinarily
31 congratulatory of the government. There is virtually no dissent whatever on any
32 point.

33 JUDGE: Yes.

34 MR WATERS: And when you consider what has since transpired and where we

1 now are, that really looks in retrospect and indeed looked at the time to be a very,
2 very inadequate response to what was being proposed in this package of legislation.

3 JUDGE: That sounds to me like a criticism of the contributions or as you would see
4 it, non-contributions of deputies in the Dáil.

5 MR WATERS: To some extent it is, Judge, but it's not my major point.

6 JUDGE: All right.

7 MR WATERS: My point then I will go on to is that the government at the time was,
8 and this is a very -- it's very interesting that the responses of the state have suggested
9 that, the respondents have suggested that the concept of a caretaking government has
10 no provenance, has no particular significance or meaning. I have here a document --

11 JUDGE: Yes.

12 MR WATERS: -- which is by the Library and Research Services of the Oireachtas
13 which actually sets out a set of principles relating to precisely that, caretaker
14 government.

15 JUDGE: Have you shared that document with counsel for the notice parties?

16 MR WATERS: I don't have any copies at the moment, Judge, unfortunately.

17 JUDGE: Well I presume you'll make a copy available and also obviously counsel.

18 MR WATERS: We will indeed, Judge. We'll have some further submissions, with
19 you permission, Judge, not submissions but various exhibits which we would like to
20 attach to our affidavit filed yesterday.

21 JUDGE: We'll deal with that separately, but you are quoting from a document you
22 say was produced --

23 MS O'DOHERTY: It's widely available, Judge, online. It's on the Oireachtas
24 website.

25 JUDGE: I'm sure it is, but it seems to me that if you are going to rely on that
26 document as part of your case against in particular the notice parties, that you might
27 furnish the notice parties with a copy of that document.

28 MR WATERS: We will indeed, Judge. We'll do that at the earliest opportunity.

29 JUDGE: All right. Well maybe could you just identify what the document is so that
30 maybe it can be obtained sooner.

31 MR WATERS: It's entitled Caretaker Governments in Ireland, Judge.

32 JUDGE: And what is it?

33 MR WATERS: It's a Library and Research Services of the Oireachtas Government,
34 document. It describes the various -- it cites article 28.1.1, "The incumbent

1 Taoiseach and ministers remain in office as a caretaker government until a successor
2 is appointed. This is the case," it says "where the Taoiseach or ministers are not re-
3 elected as members of the incoming Dáil".

4 JUDGE: Yes.

5 MR WATERS: "Ministers of state also remain in office even if not re-elected." I
6 am not certain where that precise conclusion is arrived at or how that's arrived at
7 because I forget the exact article is in question, but there is an article which states
8 very clearly that members of the cabinet must be members of either Dáil Éireann or
9 Seanad Éireann. So there seems to be some form of constitutional ambiguity or
10 perhaps contradiction on that issue.

11 JUDGE: I thought you said that -- I had the impression or maybe it was an incorrect
12 impression that that document in some way supports the case you are making?

13 MR WATERS: It does.

14 JUDGE: Well, could you possibly tell me what that is.

15 MR WATERS: It goes on then, what an Irish caretaker government can and cannot
16 do. Further down it says, "There is nothing in the Constitution or Irish law which
17 limits the powers of a caretaker government. However, if legislation were
18 introduced by a caretaker government would have to pass through the newly elected
19 houses".

20 JUDGE: Yes.

21 MR WATERS: That did not happen with this bill on the -- that was moved through
22 the Dáil on the 19th of March.

23 JUDGE: It did pass through the Dáil, didn't it?

24 MR WATERS: It did, yes. But it was allegedly passed --

25 JUDGE: And correct me if I'm wrong, but the new Seanad as I understand under the
26 Constitution, had not as yet been elected and therefore under the Constitution the
27 original senate continues to is it; is that not the case?

28 MR WATERS: Well, that's a questionable point, Judge. There's no clarity about it
29 but it would appear that the newly elected houses would seem to be clear. And the
30 implication of that to me as a layperson would be that the government is unable to
31 pass legislation as a caretaker. The provision of the Constitution says that it can
32 continue with its duties. One interpretation of that would be that its duties would be
33 ministerial duties of an everyday nature, but that insofar as legislation is concerned
34 that a caretaker government, so-called, might be prohibited from moving such

1 legislation at all.

2 JUDGE: So in effect your submission is that where you have a caretaker
3 government, that the newly elected Dáil may not pass legislation?

4 MR WATERS: Without the Seanad certainly, yes.

5 JUDGE: Well, if the Seanad is constitutionally there, surely then the legislation can
6 pass.

7 MR WATERS: All I can do, Judge, is simply repeat if legislation were introduced
8 by a caretaker government it would have to pass through the newly elected houses.

9 JUDGE: Okay.

10 MR WATERS: This document goes on then to elaborate on the concept of caretaker
11 government and the caretaker convention which is an international convention
12 dealing with these matters and gives various international experiences in this regard.
13 So all I can do is put that before the Court --

14 JUDGE: All right.

15 MR WATERS: -- and request that it be taken into account. There was also no vote
16 on that bill which again, as I repeat, was a most serious drastic and draconian bill.

17 JUDGE: Did anybody call for a vote?

18 MR WATERS: Well, no I don't believe they did but again this is part of, if we go
19 back to what happened with the letter from the Ceann Comhairle to the party leaders,
20 it seems that the entire thing was prepared in advance to avoid any possible dissent
21 arising in respect of this legislation. That is not, in my submission, what the
22 Oireachtas exists to do above all in a situation such that we were in on these
23 particular days.

24 Yes, just to remind you, Judge, the article which appears to be clear, Article 28.7.2.

25 JUDGE: Hold on now, I want to get that.

26 MR WATERS: The other members, that would be apart from the Taoiseach and the
27 Tánaiste, I think that's the reference. Yes, "The other members of the government
28 must be members of Dáil Éireann or Seanad Éireann but not more than two may be
29 members of Seanad Éireann".

30 JUDGE: Yes, but I think there is a provision though, is there not, that pending the
31 election of a Taoiseach the outgoing government remains in office; is that not the
32 case?

33 MR WATERS: It remains in office, yes.

34 JUDGE: Yes.

1 MR WATERS: It remains in office but it doesn't specify that it's entitled to generate
2 legislation.

3 JUDGE: Yes.

4 MR WATERS: Moreover, Judge, an additional point on that is that there are, as we
5 understand it, four members of the cabinet currently, if you like, caretaker cabinet
6 who are not actually members of Dáil Éireann or Seanad Éireann as a result of losing
7 their seats in the February election. That on its face would seem to present a
8 problem, particularly as one minister in particular is involved in a very active way, in
9 a front-of-house way, in presenting this legislation, aspects of this legislation, that is
10 the Minister for Social Protection, Ms Regina Doherty. These are unprecedented
11 events, Judge, I think is the point. There is, I don't think -- I don't think there is any
12 case law. The case law cited by the respondents in different ways doesn't really meet
13 these situations at all, nor could it I don't believe because, as I say, it is
14 unprecedented.

15 JUDGE: Well, you'll have seen on page 13 of the submissions from the notice
16 parties the following: "In Maguire v. Ardagh both the High Court and McGuinness J
17 in the Supreme Court noted O'Dalaigh as he then was that Wireless and so on had
18 stated" and I think this is the section I would just like to get your comments on, "This
19 survey of the Constitution is adequate to demonstrate that the Constitution makes
20 each of the two houses of the Oireachtas complete master of its own deliberations
21 and that the High Court, while granted the general jurisdiction to pronounce on the
22 constitution or validity of laws, ie, measures which have been passed by both houses
23 and duly signed promulgated by the present, exercises no functions with regard to
24 the deliberations of the Oireachtas."

25 MR WATERS: Yes, Judge, well I think that goes to the much bigger question of
26 justiciable in general in these matters which I understood be a major point of
27 discussion here today. But to begin with, I will just refer to Article 15.4.2, "Every
28 law enacted by the Oireachtas which is in any respect repugnant to this Constitution
29 or to any provision thereof, shall, but to the extent only of such repugnancy, be
30 invalid."

31 JUDGE: Yes.

32 MR WATERS: There is certainly a question mark over several aspects of this
33 including, as I say, the provision whereby members of the cabinet are required by the
34 Constitution to be members of Dáil Éireann or Seanad Éireann. And that appears to

1 be something, whether the situation is that that situation was not envisaged at the
2 time of the drafting of the Constitution which may well be the case, because I think
3 the conditions in those days would have been quite different to what obtains now. It
4 has never -- we are now actually in an unprecedented period of interregnum between
5 an election and the election of a new government and this is something that I think is
6 going to throw up many new and odd peculiarities. For example, another one, Judge,
7 is that there doesn't seem to be any time limit stipulated in the Constitution on the
8 process of negotiating a government, which means in effect that there is no time limit
9 on the rule of this government which is unelected and it was intended purely to be a
10 stopgap, constitutionally or otherwise. It could never have been envisaged that we
11 would argue about the framework of the Constitution that a caretaker government
12 could continue for any longer than perhaps a few weeks to allow a new government
13 to be elected or a new election to be declared.

14 So then as regards other aspects, Judge, I just want to refer briefly to Ms Ryan's
15 affidavit, if I can find my --

16 JUDGE: Well, are we finished with the houses of the Oireachtas?

17 MS O'DOHERTY: Well, if you don't mind, Judge -- I know there's also an issue
18 when I try to speak -- but just while Mr Waters is looking for that. Against this
19 backdrop, first of all a number of TDs, Judge, are speaking out about the fact that
20 this situation is most irregular. That there is no Dáil effectively to hold government
21 to account. There are no proper checks and balances due to the manner in which the
22 Dáil is being held. This could easily be resolved, Judge, if they were to go to a
23 premises whereby they could do their social distancing.

24 JUDGE: Yes.

25 MS O'DOHERTY: But certain TDs are now speaking out, Judge, about this, they
26 have concerns and at the time I believe certain deputies also attempted to express
27 concern. This is happening. This is all against a backdrop of a growing number of
28 arrests, Judge, which is a situation that I tried to raise with you when I came in here
29 this morning.

30 JUDGE: I'm sorry, Ms O'Doherty, but unfortunately you are drifting from
31 submission into speech at this point --

32 MS O'DOHERTY: Everything I do, everything I say is a speech.

33 JUDGE: Ms O'Doherty, it is of absolutely no assistance to me these speeches in the
34 decision which I have to take on your application.

1 MS O'DOHERTY: Well, Judge, I have a right to speak. I am an Irish citizen and
2 every time I speak you try to silence me and I'm not going to be silenced. I have a
3 right to free speech in this courtroom which is effectively owned by the people of
4 Ireland. So I will speak. John, Mr Waters has outlined a number of very serious
5 irregularities in regard to the backdrop of the current status of the Oireachtas, ie, that
6 there are at least three ministers in the cabinet introducing the most severe legislation
7 on the people of Ireland, keeping them under mass house arrest, who do not have any
8 right to be there. They have no mandate from the public. The public, their
9 constituents, kicked them out. They are unemployed.

10 JUDGE: Again, Ms O'Doherty, Mr Waters has informed me of that and you
11 informing me of that again doesn't really change matters.

12 MS O'DOHERTY: Well I want to stress some developments overnight in relation to
13 the legislation that has not been published so therefore does not exist and that many,
14 many more of our citizens are being affected. The Irish Times, even they have had
15 to admit that in the last 24 hours the number of arrests has increased significantly.

16 JUDGE: Ms O'Doherty, again, this is of absolutely no assistance to me in making
17 my decision.

18 MS O'DOHERTY: Well it's a matter of urgency because citizens are being
19 arrested --

20 JUDGE: It is of no assistance to me in making my decision. Whereas you have
21 undoubtedly a right to address the Court, but your address has to be directed towards
22 the issues which are before this Court. Making speeches which you seem to be
23 embarking on yet again is of absolutely no assistance to me.

24 MS O'DOHERTY: Judge, we have informed you this morning that An Garda
25 Síochána are acting illegally. If we cannot turn to you, who can we turn to?

26 JUDGE: And I have already made a ruling on that matter, Ms O'Doherty.

27 MR WATERS: There's just point I want to make about Ms Ryan's --

28 JUDGE: Yes, Mr Waters.

29 MR WATERS: And it's a point at paragraphs 89 and 90.

30 JUDGE: This is affidavit of Ms Ryan's?

31 MR WATERS: That's correct, yes.

32 JUDGE: Yes.

33 MR WATERS: And it goes to our point in relation to the timing of all these events
34 which I think is critical to understanding --

1 JUDGE: Paragraphs 88 --

2 MR WATERS: 89 and 90 I want to read.

3 JUDGE: I just want to be clear, is this directed now towards the respondents, that's
4 the state, as opposed to the notice parties?

5 MR WATERS: No, it has to do with the Ceann Comhairle position.

6 JUDGE: All right. Very good. That's fine. So what paragraph is it?

7 MR WATERS: 89 and 90.

8 JUDGE: Yes, what does it say?

9 MR WATERS: On the 16th of March 2020 NPHEH convened its 15th meeting. The
10 meeting considered the HSE's Covid-19 situation report number 6, week 12, and the
11 epi report, epidemiology of Covid-19 in Ireland prepared by HPSC on 15th March
12 2020 for NPHEH, a copy of this report is provided. The chair of the legislative
13 power will provide an update for the said meeting of NPHEH, work was underway
14 on the heads of bill for the Covid-19 related amendments to the Health Act 1947. It
15 was planned that the heads of bill would go to government that week." But in the
16 actual exact the bill was already in existence in draft form, had been published in that
17 form and on the --

18 JUDGE: Sorry, where was it published?

19 MR WATERS: It had been made available to -- sorry. Yes. The bill was already
20 being discussed, it was out in the public arena.

21 JUDGE: No, but you said it had been published.

22 MR WATERS: Yes.

23 JUDGE: Where was it published?

24 MR WATERS: I can't say for the moment.

25 JUDGE: I see, all right.

26 MR WATERS: But it was in the public arena.

27 MS O'DOHERTY: In the media.

28 MR WATERS: In the media and the Ceann Comhairle on the 13th of March had
29 written to deputies and party leaders concerning the issue of the numbers to be
30 allocated to be allowed in the Dáil for the discussion of this legislation. So this
31 situation was somewhat well advanced at the time that the events that Ms Ryan
32 describes. So I think that's a key point also to what we are suggesting about this, that
33 it appears that the decision was made to bring this radical legislation into effect and
34 the rationale for it was constructed retroactively and I think that's pretty clear from

1 that situation. I say 13th of March was the date of the letter from the Ceann
2 Comhairle to the party leaders inviting them to make suggestions and discuss the
3 question of the numbers which should be allocated for the --

4 JUDGE: Was it the case that this legislation was debated in the Dáil?

5 MR WATERS: Yes, on the 19th.

6 JUDGE: Okay. And presumably deputies present were free to make what
7 contributions they may or may not have wished to make?

8 MR WATERS: Yes. There's an additional point on that, Judge, at the time of the
9 letter on the 13th which implied that the numbers of the Dáil would be required to be
10 reduced to 30 percent of the normal figure of the full complement which would be 48
11 deputies, at that time there was no directive emanated from any source to indicate
12 other than that gatherings over than 100 people would be prohibited. So there was
13 no necessity at that moment for the extreme manner of the nature, of the way the
14 debate was conducted. But moreover there is provision in the Constitution whereby
15 sittings of Dáil Éireann can be moved to other buildings. There's no necessity -- in
16 special circumstances meetings of the Dáil can occur in the convention centre, for
17 example, or Citywest or some such venue. I think particularly in a situation as
18 allegedly dramatic as the government was facing at this time, that would have been
19 appropriate.

20 JUDGE: Is the Dáil not entitled or the Oireachtas not entitled to set their own
21 procedures as to how matters should proceed?

22 MR WATERS: Well, Judge, I think that what I'm trying to raise here is not the letter
23 of every law, but the question of the situation that was being addressed where the
24 government and the Oireachtas was poised to withdraw from citizens the most
25 fundamental rights available to them via the Constitution and that it seems to have
26 been approached in the most cavalier and slack-handed fashion when it ought to have
27 been treated with absolute punctiliousness in terms of ensuring that visibility,
28 transparency, accountability, all of these factors were present so that the public might
29 see on what basis, and hear on what basis their rights were being withdrawn and hear
30 voices of dissent and objection and questioning about these matters, regardless of
31 whether or not in the end it was decided to proceed. That is the whole purpose of the
32 Dáil and the Seanad. That is the purpose of an opposition and it seems that every
33 means was taken to ensure that this would not occur on this occasion. This is our
34 point.

1 JUDGE: I mean, I hear that point. But in the truth isn't that point directed towards
2 the politicians who you believe didn't articulate the views which you wanted them to
3 articulate?

4 MR WATERS: Oh no, Judge, this has nothing to do with my views at all. I have no
5 views particularly that I would wish to convey to politicians other than that they
6 would do their job. You see, I think we'll come to this question in due course, I
7 mean if you wish I can touch on it now but I temporarily mislaid my notes on that
8 substantive issue of justiciable, but I can certainly address it for you.

9 JUDGE: Yes.

10 MR WATERS: If you give me a few moments.

11 JUDGE: Of course.

12 MR WATERS: I will try to find my notes if you bear with me. I can't find them at
13 this moment, but I can work from memory, Judge, on the basis of the notes.

14 JUDGE: Okay. And this is on the point, as you know, of the non-justiciability of
15 the procedures in the house.

16 MR WATERS: Yes.

17 JUDGE: As has been I think set out in some details of the submissions of the notice
18 parties.

19 MR WATERS: Yes.

20 JUDGE: You are saying you disagree with those submissions.

21 MR WATERS: I do, Judge, yes.

22 JUDGE: And you are going to raise, as it were, counter submissions to indicate
23 where the notice parties are incorrect.

24 MR WATERS: Yes.

25 JUDGE: Okay.

26 MR WATERS: Yes, the question of justiciability, it seems we would submit, as you
27 said that, you suggested that the courts have no business, if you like, intervening in
28 the affairs of the Oireachtas.

29 JUDGE: Yes.

30 MR WATERS: Insofar as the matters of the business of the Oireachtas in terms of
31 whatever is said in the Dáil or the Seanad chambers, whatever is done in the business
32 of the daily affairs of their office, that is the case. However, I do not think that is the
33 absolute position. In the respondent's submission it says, O'Brien v. Clerk of Dáil
34 Éireann, Ní Raifeartaigh J commented on this question of principle which emerged

1 in the Supreme Court decision that "It would be inappropriate for the courts to
2 intervene in this area save in exceptional circumstances". I think that's the key
3 phrase there, "save in exceptional circumstances". And later on it says, "In this area
4 the" --

5 JUDGE: Sorry, you are reading from that. Can you just tell me what you are
6 reading from so I can follow it.

7 MR WATERS: I beg your pardon, I'm reading from page 14 of the affidavit --

8 JUDGE: The submissions I suppose.

9 MR WATERS: Submissions, yes.

10 JUDGE: And you were referring to exceptional circumstances?

11 MR WATERS: Yes, it seems to me the judge said that the Court was signalling that
12 any intervention by the court in this area would require very exceptional
13 circumstances indeed. Well, first of all I would say that that's not an absolute
14 prohibition on intervention by the courts.

15 JUDGE: Well, just go on to the next sentence, it says, "The two examples given go
16 to the very heart of the function of the Oireachtas itself and it is not clear whether
17 even in those two situations the Court would have approved of an intervention."

18 MR WATERS: Indeed. I don't have the actual case the know what the nature of
19 those was.

20 JUDGE: Shouldn't you really be finding those out before you say it's an exceptional
21 case?

22 MR WATERS: Well, I have other cases I can cite, Judge.

23 JUDGE: All right. Very good.

24 MR WATERS: Yes. So we say that whereas in the normal course of events it is
25 inappropriate for the courts to interfere in the business of parliament. Decisions that
26 are made for political purposes may be justiciable, thus the question of legality
27 precedes any question of --

28 JUDGE: Sorry, what are you reading there from, Mr Waters, please?

29 MR WATERS: These are my own notes, Judge.

30 JUDGE: Oh sorry. Oh right. I see. This is your view. Sorry, I thought you were
31 reading from another case.

32 MR WATERS: No, I'm just introducing the case then. The case I wanted to talk
33 about is the case which is a well-known case a year ago in the United Kingdom.

34 JUDGE: Yes?

1 MR WATERS: Where the parliament was prorogued by the Queen of England on
2 the advice of the Prime Minister Mr Johnson. This was very thoroughly investigated
3 by the courts in both in England and Scotland and the Supreme Court of -- in the
4 British Supreme Court. The case in question was Cherry & Others v. The Advocate
5 General in Scotland.

6 JUDGE: Yes.

7 MR WATERS: And in that case Lord Boaly said, "What has led me to conclude that
8 the Court is entitled to find the making of the order unlawful" this is the order to
9 prorogue the parliament, "is the extreme nature of the case. A formulation to which I
10 have been attracted is found in chapter 14, Crown Powers, The Royal Prerogative
11 and Fundamental Rights in Wilberg & Elliott to scope an intensity of substantive
12 review part 2015 at page 374 where the author of the chapter Salaz LJ as he then was
13 referred to a group of authorities where the courts had been prepared to review
14 exercise of the Crown's common law and prerogative powers. The formulation is,
15 these are egregious cases where there is clear failure to comply with generally
16 accepted standards of behaviour of public authorities. I see this as an egregious case.
17 Mr O'Neill came to submit that the essence of the illegality here was irrationality.
18 Mr O'Neill may be right about that, although I would see it as having to do with
19 improper purpose. At all events I consider the order to be unlawful and that making
20 it was contrary to the rule of law." In the same case Lord Drummond Young
21 said, "The importance of the rule of law should be self-evident. A system of
22 democratic government that pays proper respect to the rights of citizens must be
23 based on a system of rules and those rules must be properly interpreted and
24 consistently applied otherwise government is liable to dissent into tyranny or
25 anarchy. The doctrine of the sovereignty of parliament emerged from the
26 constitutional conflicts of the 17th century and in particular from the settlement
27 affected by the revolution of 1688 to 1690. The principle was recognised in various
28 statutes that followed the revolution. Notably the Claim of Rights Act 1689 in
29 Scotland, the Bill of Rights 1688 and the Act of Settlement 1700 in England and
30 Wales and the Acts of Union of 1706 and 1707 in England, Wales and Scotland
31 respectively. Central to the revolution settlement, however, was the principle of the
32 rule of law, does the introductory cause of the Claim of Right Act refers to King
33 James VII invading the fundamental constitution of the kingdom, altering it from a
34 legal limited monarchy to an arbitrary despotic power and asserting an absolute

1 power to annul and disable laws. The Bill of Rights likewise refers to the kings
2 assuming and exercising a power of dispensing with and suspending laws without
3 the constant of parliament. These two statutes reflect the fact that Rule of Law is
4 fundamental to the constitutional system of the United Kingdom. The maintenance
5 of the Rule of Law determined what the law is in ensuring that it is consistently
6 applied and if necessary enforced is a primary function of the judiciary. That is a
7 task that must obviously be carried out with scrupulous impartiality and objectivity.
8 Judicial independence is central to that function. The executive cannot be judged of
9 its own powers. Independent courts must be able to consider the exercise of those
10 powers in order to determine whether such exercise is or is not *intra vires*." Then in
11 the same court, Lord Drummond Young said, "The grounds for judicial review are
12 well known and do not require to be restated. They include *ultra vires* in the narrow
13 sense in the use of a power for an improper purpose, something that does not fall
14 within the purpose of the power construed objectively is intended to achieve. Those
15 grounds are legal in nature, however, and do not normally go to policy questions,
16 including political matters. In judicial review the primary decision-maker is a body
17 or person other than the court and the court only has jurisdiction to review the
18 legality of decision, not its merits. In relation to prorogation of parliament this
19 feature is particularly important as a decision to prorogue parliament is likely to be
20 based on political considerations. This may make it difficult to apply standards such
21 as proportionality which does involve consideration of the merits of a decision.
22 Nevertheless, standards of review are flexible and in appropriate circumstances it
23 would be possible for the court to hold that a decision by the executive to exercise
24 their prerogative power is one that no reasonable person in that position could
25 exercise. It is sufficient to hold that the Court has jurisdiction to consider whether
26 the exercise of a power including a prerogative power is *ultra vires* or whether such a
27 power is used for a purpose that is objectively outward its intended scope." And then
28 that case went into the Supreme Court where the judgments were essentially
29 upheld --

30 JUDGE: Yes.

31 MR WATERS: -- by the judges there unanimously, I believe on that occasion, I
32 think it was ten judges.

33 JUDGE: I suppose all that raises the question, how does all that sit with the
34 provisions of our Constitution?

1 MR WATERS: Yes, Judge, it does raise that question. I think what the parallel or
2 the analogy to be drawn in this situation is with relation to our Constitution, that in
3 fact what is being usurped in this situation by an arbitrary power, in our situation was
4 the constitutional rights of the people. In that situation I believe that the questions of
5 constitutionality really cannot be considered apart from the process itself and must at
6 the least run in parallel to a consideration of the role of the various actors in
7 formulating these laws which, if they do turn out to be unconstitutional, if so a judge
8 will have -- this will have amounted to a very serious situation.

9 JUDGE: Hmm.

10 MR WATERS: I would propose at the very least that this question of justiciable
11 should be postponed until the question of constitutionality -- in relation I mean to the
12 notice parties and the role of the Oireachtas, the Ceann Comhairle and these actors in
13 that particular function cannot be dealt with in advance of a decision in relation to
14 the constitutionality of these matters.

15 JUDGE: Why not?

16 MR WATERS: Because the question of wrongful actions, unlawful actions and so
17 on, which would be within the remit of the Court to deal with according to these
18 judgments, needs to be held in reserve pending the outcome of the question as to
19 whether or not there was unconstitutionality arising from these procedures and from
20 the resulting legislation.

21 JUDGE: Supposing the legislation is constitutional, supposing that was the case.

22 MR WATERS: Yes, Judge.

23 JUDGE: How would that affect your case against the houses of the Oireachtas then?

24 MR WATERS: I think, Judge, if you recall the notice parties, the house of the
25 Oireachtas parties are here at the behest of the primary respondents, not at our
26 behest. So we are simply dealing with --

27 JUDGE: But are they not here because part of your claim against the validity of the
28 legislation is the manner in which that legislation was enacted by the Oireachtas?

29 MR WATERS: Yes indeed, it is.

30 JUDGE: That's why we are here.

31 MR WATERS: This is part of our case in relation to the unconstitutionality and part
32 of the telling of the story of how the sequence of events which caused this to occur
33 which we would submit was in part the consequence of a total lack of due diligence,
34 both at the administrative level, the executive level and at the parliamentary level.

1 And that the procedures which were put in place by the Ceann Comhairle were both
2 unnecessary and damaging to the process of considering this very momentous
3 legislation. That is the reason that we included these aspects of the parliamentary
4 process in our submissions.

5 JUDGE: Okay.

6 MR WATERS: So I didn't go on to read from the Supreme Court, but it's pretty
7 much a repetition and reinforcement of --

8 JUDGE: It seemed to follow along the decision of the court in Scotland; isn't that
9 right?

10 MR WATERS: That's correct, yes. For the moment, Judge, that's all I have really, I
11 think. Just give me a moment.

12 JUDGE: Certainly, yes.

13 MR WATERS: They were the main points arising from the submissions that we
14 wished to draw the Court's attention to at this point.

15 JUDGE: Yes, all right.

16 MR WATERS: Other than that, I have nothing, I don't think at this moment to add.

17 JUDGE: All right. Thank you very much, Mr Waters.

18 MR WATERS: Thank you, Judge.

19 JUDGE: So what I propose to do now is to ask the counsel for the respondent and
20 then counsel for the notice parties and then you will obviously have an opportunity
21 to respond to their submissions. Okay. So Mr McCann.

22 MR McCANN: Thank you, Judge. So, Judge, on behalf of the respondents, I will be
23 saying the applicants do not, given the nature of their case, it's their case, and the
24 way it has been made, they do not pass over the low threshold of an arguable or
25 stateable case and I'll be saying that for a number of reasons, Judge. First, again this
26 had been foreshadowed in our written submissions that these applicants do not have
27 sufficient interest in the subject matter. Secondly, that there's no evidence before the
28 Court which would enable the Court to make any assessment as to whether or not the
29 personal rights of these applicants have been infringed. Thirdly, Judge, I'll be saying
30 in due course in more detail that this application in its own terms is clearly dependent
31 on and has entered into an area of expert evidence and there's no expert evidence
32 relied on or relied on in the affidavits. I'll be saying then, Judge, that this case is
33 fundamentally unparticularised and that that is also a breach of the rules of court and
34 that that lack of particularity as to the case being made by the applicants means that

1 the Court, if there were leave to be granted, the Court that ultimately heard the case
2 would be unable to come to any assessment as to whether or not the measures were
3 warranted or constitutionally sound or not. I will be then dealing with a number of
4 the stray points, if I can put it in those terms, that the applicants have made in
5 relation to subordinated regulation, that's the Article 15 point, the Article 28.3 point.
6 I'll be leaving to Mr Kieran the matters in relation to the notice parties. I propose not
7 dealing with those.

8 The last point I'll be making, Judge, and this is a fundamental overarching point is
9 that even if the applicants have sufficient interest in the matter, even if the matter
10 could be seen as being particularised, even if the evidential gaps can be overcome,
11 that's the lack of evidence in relation to the applicants personally and the absence of
12 expert evidence, even if all of that could be overcome, there's a fundamental error
13 and this has been pointed out to the applicants, not just by counsel for the state but
14 also by Ms Justice Murphy I understand, and it's this, Judge, it's that the proper and
15 only procedure for directly challenging the validity of legislation is by way of
16 plenary proceedings, and judicial review is not the appropriate mechanism. I'll be
17 saying, Judge, that it's also the case that judicial review is not the appropriate relief
18 or the appropriate mechanism for a challenge to the validity of secondary legislation,
19 in this case the statutory instruments. I'll be saying that a direct challenge to a
20 statutory instrument ought to be taken and I'll be pointing out the passages in Hogan
21 and Morgan, such a challenge ought to be brought in plenary proceedings.

22 Now, Judge, I have specific instructions which I consider to be generous and they are
23 the following terms: I'm saying their case is doomed by way of judicial review under
24 the rules, but I'm saying that the attorney general is mindful that the applicants or lay
25 litigants and I'm bringing to the Court's attention that the Court has a jurisdiction and
26 I'll be setting out where the jurisdiction comes from, to adjourn these proceedings to
27 plenary proceedings. I also might make the point in that regard that even if I were
28 wrong on all the other points I told you about, about standing, not being the
29 correct procedure, that the arguability thresholds haven't been met, even if I was
30 wrong on that, I'd say that this case still should, even if it could be brought by
31 judicial review still should go to plenary proceedings because the case will require
32 oral evidence and cross-examination including expert evidence and
33 cross-examination and will also require discovery and therefore judicial review, even
34 if we are strictly availing about the leave stage wouldn't be the appropriate procedure for

1 dealing with a case of this nature. I'll be coming to that, but that point, I suppose, is
2 the last point I want to make, Judge.

3 JUDGE: I don't quite follow that. Are you saying that you are asking the Court to
4 refer to -- you say correctly the Court under the rules can convert judicial review
5 proceedings into plenary, are you asking me to do that?

6 MR McCANN: I am just noting that you can do that, Judge. I am asking the Court
7 to refuse leave.

8 JUDGE: All right. You are asking the Court to refuse leave. Okay.

9 MR McCANN: Yes, in these proceedings the applicants are seeking the leave of the
10 court to bring judicial review proceedings. The principles which apply have been set
11 out. I don't think they have been seriously contested by the applicants in the case of
12 G v. the DPP, that's the 1994 case which is in the book of authorities. This means
13 that the applicants have to establish on a prima facie basis with them bearing the
14 burden of proof, that they have sufficient interest in the proceedings, that the facts if
15 proved would give rise to stateable grounds for the relief sought, and also that they
16 have an arguable case on the law.

17

18 Judge, if we might just, I think in the book of authorities, Judge, it might be useful to
19 look at the rules at this moment. In the book of authorities you have a version of
20 Order 84, but the position is that, this is at tab 11, the position is that there was an
21 amendment to the rules in the 2011 --

22 JUDGE: Yes, that's right.

23 MR McCANN: -- which the Court will be well familiar with.

24 JUDGE: Yes, I have those.

25 MR McCANN: You have that. There's a copy being handed to the applicants.

26 JUDGE: Yes.

27 MR McCANN: I just might signal three rules, three rules or three sub rules in fact of
28 the Rules of the Superior Courts and do them together, Judge.

29 JUDGE: Yes.

30 MR McCANN: So, Judge, it's Order 84 and I'm asking the Court to look at rule 20
31 sub rule 3.

32 JUDGE: Which says, "A Court may allow the applicant's statement to be amended
33 whether by specifying"; is that the one?

34 MR McCANN: I think in the version I'm reading, of course it's possible that I've the

1 wrong version, it begins, "It shall not be sufficient for any applicant to give as any of
2 his grounds for the purposes of paragraphs 2 or 3." So this is Order 84, rule 20 sub
3 rule 3.

4 JUDGE: All right. My sub rule 3 sounds like it's different to your sub rule 3.

5 MR McCANN: I see. Well it may -- just a second.

6 JUDGE: Maybe I should take your version.

7 MR McCANN: Maybe so, Judge.

8 JUDGE: Thank you. So it's order?

9 MR McCANN: Yes, Judge, I think the SI, it's on the fourth page in, page 412 and
10 it's Order 84 rule 20 sub rule 3.

11 JUDGE: "It shall not be sufficient"?

12 MR McCANN: Exactly, Judge.

13 JUDGE: All right. Fine. Sorry.

14 MR McCANN: I just thought it would be easier to advert the Court to these three
15 rules in particular together. So first as regards particularisation, I'm alerting the
16 Court to sub rule 3, "It shall not be sufficient for an applicant to give as any of his
17 grounds for the purposes of paragraph 2 or 3 sub rule 2(a) an assertion in general
18 terms the grounds concerned but the applicant should [open brackets] on the contrary
19 [I'm saying open brackets by the way] should state precisely each such ground giving
20 particulars where appropriate and identifying in respect of each ground the facts and
21 matters relied on in supporting that ground." And I'll be coming -- I'm just alerting
22 the Court that that rule is there and I'll be addressing that in the course of my
23 submissions. Now the other point I want to alert the Court to is that there's an
24 amendment jurisdiction open to the Court, that's the next sub rule, Judge, number 4,
25 "The Court hearing an application for leave may on such terms and thinks fit allow
26 the applicant's statement to be amended, for example." I just note, Judge, and I'll be
27 coming back to this, that the affidavit sworn yesterday by the applicants looks for
28 different relief than was set out in the ex parte docket and was set out in the
29 statement of grounds and will be necessary if the applicants want to pursue that relief
30 to make an application to amend their statement of grounds. Then, Judge, the third
31 sub rule which I want to alert the Court to at this time sub rule number 5 there which
32 I will be dealing with most immediately in these submissions, "The Court shall not
33 grant leave unless it considers the applicant has sufficient interest in the matters to
34 which the application relates".

1 JUDGE: Yes.

2 MR McCANN: So they are the sub rules in particular that I want to bring the Court's
3 attention to. If we just look at sub rule 5, in my submission it means if necessary, I'm
4 saying it's not necessary, but it means if necessary that in fact the rule for sufficient
5 interest or standing in judicial review proceedings is in fact more rigorous than for
6 plenary constitutional proceedings. I'm saying that the sub rule imposes a
7 mandatory, they use the word "shall obligation on the court to be satisfied that the
8 applicants establish sufficient interest". So, Judge, I'm saying in my submission I
9 don't need to rely on this rule because they don't have standing that -- they don't have
10 standing that would satisfy the usual rules for constitutional standing, but I'm saying
11 that in addition the rules for judicial review as regards standing are more strict. This
12 then, Judge, brings me to --

13 JUDGE: But I mean, is it not the case that both Ms O'Doherty and Mr Waters are
14 subject to the regulations concerning free movement?

15 MR McCANN: Yes, and I think that's where they come closest and I will be coming
16 to that.

17 JUDGE: Presumably they don't have to wait until they are, say, arrested and charged
18 before they could bring such an application.

19 MR McCANN: Yes, I think that is the case and I think it's page 24 of, it's either
20 their affidavit or their -- I think it's page 24 of their affidavit which they swore
21 yesterday --

22 JUDGE: Yes.

23 MR McCANN: -- in relation to regulation 4 of SI 121, that's I think you described it
24 in reasonable shorthand yesterday, the moving around regulations. I think that's
25 where they come closest to establishing standing, but I'll be explaining to the Court
26 why they don't have standing in that regard. I might just do it this way, Judge, if I
27 may, and that is I'd prefer to before jumping ahead to the last point I'm going to
28 make, I'd prefer just to open a small number of passages in the only two judgments I
29 intend opening to the Court, if I might do it that way.

30 JUDGE: Yes, all right.

31 MR McCANN: The question will be answered and hopefully, and correctly. Judge,
32 I just want to ask you to look at the book of authorities and I'll be asking you, I think
33 I said I'll be only asking you to look at two judgments but it might be three in the
34 course of the submissions.

1 So, Judge, number 3 in the book of authorities is the case of Cahill v. Sutton and just
2 to identify for the Court a number of passages which I am relying on. I'll just
3 identify the passages. Judge, if we turn to page 283.

4 JUDGE: Yes.

5 MR McCANN: I am relying on the first paragraph under 5. I am relying on all of
6 page 284 except the middle paragraph beginning "In particular" and I'm relying on
7 the entirety, or sorry, the two paragraphs on page 285 and I'm relying on the
8 paragraph under (vii) on page 286. So just to identify these important points, Judge,
9 if we turn to page 283, and this is a complaint which I think can be particularly
10 levelled at the claim being made by the applicants. So, in particular, Judge, in
11 relation to the claim in respect of the amendments to the Mental Health Act and the
12 claims in respect of the Residential Tenancies Acts, but also other claims, and that is
13 the Court has set out how it is inappropriate for one litigant to present another
14 person's case. So, Mr Justice Henchy says to allow one litigant to present and argue
15 which is essentially another person's case would not be conducive to the
16 administration of justice as a whole without concrete personal circumstances
17 pointing to a wrong suffered or threatened, the case tends to lack the force and
18 urgency of reality. There's also the risk that the person's case being put forward
19 unsuccessfully by now they may be left with the grievance that its claim was
20 wrongly or inadequately presented. And this is the obvious point, Judge, that a
21 patient detained pursuant to the Mental Health Act 2001 should be entitled if they
22 say their rights have been jeopardised by the amendments to the 2001 Act or if there
23 is some unconstitutionality in those amendments, that person who has actually
24 suffered a change in their circumstances due to the changes in the law, perhaps
25 because a tribunal was reduced or because they didn't have a personal attendance by
26 the psychiatrist doing the independent report pursuant to section 17, they are the
27 persons who should be taking the case and not persons who are not patients in
28 psychiatric hospitals or at any risk of being such. The point being that the person
29 whose case it isn't, will not present, will not have the factual circumstances which
30 will allow the Court to properly adjudicate on the issue. Then there is the well-
31 known passage about the crank and the obstruction to the meddlesome and perverse
32 and men of straw which is familiar to the Court. Then again on page 284, yes, it just
33 sets you out the test that it is in fact reasonable that a person should show that they
34 have an interest which has either been damaged or they apprehend it's going to be

1 damaged and Mr Justice Henchy in the Supreme Court said that that is appropriate.
2 Then moving on to page 286, and this is again dealt with in the next judgment I'll be
3 asking the Court to look at, the Mohan judgment, this is described as the primary rule
4 of standing and constitutional matters and it's only as regards plenary proceedings
5 and as regards a constitutional claim a rule of practice and I accept that in respect of
6 a constitutional claim which has been brought by way of plenary proceedings, but
7 I'm saying that doesn't apply in relation to a claim by way of judicial review.
8 Then, Judge, I'll be asking the Court to look at indent 10 and that's the Mohan
9 judgment.

10 JUDGE: Yes.

11 MR McCANN: It should be at indent 10. I'm asking the Court to move to paragraph
12 11 of the judgment of Mr Justice O'Donnell. Midway down that paragraph he says,
13 the Court says reiterating the tests set out in Cahill v. Sutton he says, "Rather in Irish
14 law" this is the middle paragraph, Judge, "In Irish law it is necessary to show some
15 adverse effect on the plaintiff either actual or anticipated." This is paragraph 11,
16 Judge, midway through paragraph.

17 JUDGE: Yes.

18 MR McCANN: "Part of the rationale for this rule is discussed in Cathal v. Sutton.
19 Public general legislation exists because the majority of the members of the
20 Oireachtas considered at some stage that the legislation was in the public interest.
21 The particular provision challenged may indeed still operate beneficially and
22 helpfully for the great majority of such cases. If a provision is invalidated it is in
23 principle of no effect in law and the area is left unregulated." And so on. Then to
24 identify paragraph 12 also to you, Judge, "The step of permitting a challenge to the
25 Constitution or validity of a piece of legislation should not therefore be taken lightly
26 simply because someone wishes however genuinely to have the question determined,
27 but rather should only be taken when a person can show that they are adversely
28 affected in reality." And it will be the state's case that these applicants have not put
29 evidence before the Court, including under regulations 4, regulation 4 of SI 121 that
30 they have been affected adversely in reality.

31 JUDGE: Do they not come within the definition of the persons to whom the freedom
32 of movement --

33 MR McCANN: Yes.

34 JUDGE: -- or the restriction of movement regulations?

1 MR McCANN: They do, Judge, yes. They do come within the definition of
2 applicable person.

3 JUDGE: Applicable person, sorry.

4 MR McCANN: Again without wanting to be seen to be postponing that, I say that is
5 the closest they come to standing but I'll explain to you in due course why they don't
6 have standing in relation to that. And then the Court goes on at paragraph 12 to say
7 that the Court is not here to act as, you know, a forum of wise people to look at
8 matters in an academic way. Then paragraph 13, in the aftermath of Cahill v. Sutton
9 it was therefore clear that there was a requirement to establish standing before a
10 Court was obliged to entertain a challenge with relation to legislation, the
11 circumstances which would justify a relaxation of the primary rule remain for
12 determination, some of those circumstances were indeed... in subsequent years. In
13 terms of the primary relief itself, it was certainly established that it was sufficient
14 should the plaintiff's interest have been adversely affected or in danger of being
15 adversely affected by operation of the statute. What remains to be determined
16 perhaps arises in this case is what precisely is meant by a person's interest being
17 adversely affected."

18
19 And then, Judge, go on to paragraph 16 where the question of what is an interest is
20 addressed. The Court says, "I think it is noteworthy that Henchy J speaks in terms of
21 a person's interest", this is paragraph 16, Judge, "being affected rather than his or her
22 rights. This in my view is logical even if there is little harm in conflating the two
23 questions in most cases. Strictly speaking, however, the first question is whether a
24 person's interests were affected by the permission in question. Interest is a
25 deliberately broad term extending beyond constitutional or even legal rights. It is
26 sufficient if a person is therefore affected in a real way in his or her life. So, Judge,
27 I'm saying that is the test, a real way in his or her life. If so they normally have
28 standing, and so on and so forth.

29 So, Judge, I'm saying arising from this there's a certain number of propositions which
30 the Court can take regarding standing generally, locus standi which is a concept
31 analogous to sufficient interest. I'm saying, Judge, in general and as a rule of
32 practice an applicant must establish that it has suffered or is likely to suffer some
33 detriment to their interest caused by the operation of the impugned legal instrument.
34 I'm saying that's the test of constitutional law. Judge, there has to be an interest and

1 an actual of apprehended injury to an interest and there has to be a causal link
2 between the two. I want to put some stress on that notion, Judge, it's not just enough
3 to say there is an act. There is a constitutional provision, they may be related to each
4 other or they may refer to the same circumstances. The applicant or the plaintiff in
5 constitutional litigation must establish an actual or apprehended causal link between
6 the legislation and constitutional provision. And then, Judge, as set out in Mohan,
7 the person must be affected in a real way and on the basis of evidence, sworn
8 evidence in his or her life.

9
10 Then, Judge, as I was saying earlier, it's certainly a case, there can be exceptions in
11 constitutional litigation as to where the rule of standing can be relaxed. I'm saying
12 that the mandatory terms of Order 84 rule 20 sub rule 5 which we have discussed
13 don't allow for any such relaxation. But I said even if I'm wrong on that and if the
14 rules can be interpreted so as to allow for relaxation, I'm saying that none of the
15 exceptional circumstances or the exceptions to the primary rule of standing apply, so
16 it is not the case such as in Crotty that no other person is better placed to bring the
17 proceedings. Obviously the person in the psychiatric hospital is better placed to
18 bring his or her case.

19
20 I'm saying that the applicants don't purport to be bringing the case on behalf of
21 persons with a disability, for example, that doesn't apply. Then, it's not the case that
22 no other person can or will bring such proceedings as was the case in some of the
23 Riordan cases, some of the earlier Riordan cases and in the Digital Rights case where
24 McKechnie held that nobody other than artificial person or legal person was likely to
25 bring such a case. So I am saying these applicants on the basis of the affidavits they
26 have sworn don't meet the primary rule of standing and don't come within any of the
27 exceptional categories.

28 Now, Judge, a further matter, a further concept which is related to the question of
29 sufficient interest and is relevant for the Court is the question of *jus tertii* which of
30 course means that a person including these applicants can't bring somebody else's
31 case and they can only rely on arguments which bear on their own personal
32 circumstances. I'm saying this rule of *jus tertii* was referred to both in *Cahill v.*
33 *Sutton* and again in the *Mohan* case, it also operates here because we can see already
34 today at the application for leave stage, that on the basis of the evidence before the

1 Court and the submissions made by the applicants, many of the points they are
2 making rely on the rights of other persons being infringed and the obvious example
3 being landlords and tenants under the Residential Tenancies Act or persons in
4 psychiatric hospitals under the amendments to the Mental Health Act.

5

6 Judge, in this regard I want to look at the statement of grounds and then the affidavit
7 which was sworn by the applicants yesterday. So, Judge, if we just turn to the
8 statement of grounds, and indeed if we might begin by just looking at the ex parte
9 docket, Judge.

10 JUDGE: Where will I find the ex parte?

11 MR McCANN: Well there should be a book of pleadings.

12 JUDGE: In the book of pleadings. All right.

13 MR McCANN: That's probably the affidavit, Judge, is it?

14 JUDGE: There is the ex parte. I have the affidavits separately. I have the ex parte
15 motion, is that what you are looking at?

16 MR McCANN: Yes. Very good. And just again to note, Judge, the relief sought in
17 the ex parte docket is an order of certiorari annulling two acts and a statutory
18 instrument as ultra vires. I say that's not the case being made, though perhaps an ex
19 parte dockets they are not, they are not bound by that but they are bound at least until
20 an application is made by the statement of grounds, Judge.

21 JUDGE: Yes.

22 MR McCANN: And if we look at page 1 of the statement of grounds.

23 JUDGE: Hold on, I just want to get the statement of grounds. Now, that's the
24 affidavit and that's the statement of grounds. Yes. Now, you want me to look at
25 what?

26 MR McCANN: So, Judge, if we look then at the first page of the statement of
27 grounds.

28 JUDGE: Sorry, can I just get this out of the way for the moment. Thanks. Right, so
29 page 1.

30 MR McCANN: Yes. So the present position, Judge, is that until an application is
31 made to amend the statement of grounds that at the moment the applicants are
32 looking for an order of certiorari declaring the enactment of the following null and
33 void.

34 JUDGE: Yes.

1 MR McCANN: I'm saying as matters stand and of course they have actually
2 clarified it in their affidavit.

3 JUDGE: Yes, I think they have at the end of the affidavit.

4 MR McCANN: They have.

5 JUDGE: They are effectively seeking declaratory relief; isn't that right?

6 MR McCANN: Exactly, but I think, Judge, they have to take the formal step of
7 actually doing that.

8 JUDGE: Yes.

9 MR McCANN: Without being unduly fastidious about it on the part of the state.
10 Then, Judge, if we are moving forward, so we move to page 11, Judge, there seems
11 to be some in relation to Article 28.3.3 there seems to be some misapprehension on
12 the part of the applicants that the state is relying on this article and that it has
13 disappplied the Constitution, and that's not the case. There's no declaration -- sorry,
14 Judge, this is page 11.

15 JUDGE: Unfortunately the pages aren't numbered.

16 MR McCANN: Sorry, Judge. Well then I think the difficulty then also is not every
17 paragraph is --

18 JUDGE: If you can just go ahead.

19 MR McCANN: Yes, so the heading, Judge, it's after -- it moves this way, Judge,
20 there's the background facts and the applicants deal with that in a number of pages.

21 JUDGE: Yes.

22 MR McCANN: Then there's the matters before the Dáil. I'm not sure that's going to
23 help, Judge.

24 JUDGE: I am reluctant to get three copies of the same document.

25 MR McCANN: I'm not sure that's going to help.

26 JUDGE: Thank you very much. So what page is it on the paginated version?

27 MR McCANN: 11 is the version I'm working off.

28 JUDGE: Mr Waters, have you got your paginated version so you can follow this?

29 MR WATERS: I do indeed, Judge.

30 JUDGE: All right. Very good. Sorry, now page 11 says what?

31 MR McCANN: Page 11, so, Judge, just note there at paragraph 7 on page 11 do you
32 see that, Judge, in the middle of the page?

33 JUDGE: Yes.

34 MR McCANN: There's reference there to Article 28.3.3.

1 JUDGE: Yes.

2 MR McCANN: Just to say that Ireland, the minister and the attorney general is not
3 saying that there has been a declaration of emergency or that the constitutional rights
4 of citizens have been disapplied and they are not relying on that article.

5 JUDGE: Yes.

6 MR McCANN: The applicants are under a misapprehension in that regard.

7 JUDGE: I think Mr Waters was making the point that really the article in the
8 Constitution that deals with emergencies is Article 28.3.3 and that references to an
9 emergency in Article 24, I think as he described it, were just an emergency I think he
10 said in passing.

11 MR McCANN: Yes.

12 JUDGE: So I mean is it the case that Article 28.3.3 applies to a specific type of
13 emergency whereas the rest of the Constitution -- in which case effectively the
14 legislation which is passed concerning that emergency is immune from Constitution
15 save from the death penalty, I think.

16 MR McCANN: Yes.

17 JUDGE: In every other case it has to be in conformity with the Constitution be it a
18 financial emergency or medical emergency or whatever.

19 MR McCANN: Yes, yes, and that's the position of the state.

20 JUDGE: All right.

21 MR McCANN: Judge, then the next part of the statement of grounds I want to look
22 at is page 12.

23 JUDGE: Yes.

24 MR McCANN: So, Judge, you'll see here and generally that there's a structure
25 whereby the applicants identify here section 31 of the 1947 Act as amended and they
26 recite as they have done earlier, the provisions of the Act as they have done it on
27 page 12 for example, and while they might not absolutely perfectly transcribe the
28 provisions of the Acts, for example they talk about the guards having the power to
29 break and enter premises, that's not language used in the Act. But that's a minor
30 point. The point I want to make, Judge, is that there's no plea as regards this Act.
31 There's no plea in the statement of grounds that the applicants will be personally
32 affected. So the structure is, here's the Act, here's what the Act says and then here's a
33 list, seven I think, provisions of the Constitution, one of which is not admissible by
34 the courts but the other six are, and it's saying that when you look at these things

1 there's an unconstitutionality or there's a question of the validity of the legislation. I
2 think that's precisely what you can't do because of the standing rules and it's not
3 sufficient just to say there's the legislation on one hand, there's the Constitution on
4 the other hand and now the Court must decide whether or not one is compatible with
5 the other. What the applicants are required to do and plaintiffs in a Constitution
6 litigation are required to do, is they are required to set out personal circumstances as
7 to how their lives are lived which relate to the legislation. I say they haven't.

8 JUDGE: But surely restrictions on travel requiring persons to remain in their home,
9 I mean doesn't that directly affect the applicants as indeed it does every other citizen?

10 MR McCANN: Yes. If we come to regulation 4, the answer to that is that, and it's
11 again set out in the affidavit of the applicants which they were sworn yesterday, we'll
12 just turn to page 24. So if you turn to page 24 of the affidavit, assuming your version
13 is numbered as mine is, Judge.

14 JUDGE: Okay. This is -- I'm just trying to get hold of it now. Go on, Mr McCann,
15 I'll catch up with you.

16 MR McCANN: So, Judge, what I'm saying -- I'm saying that that paragraph,
17 unnumbered paragraph but it's on page 24 of the affidavit, we looked at it
18 yesterday --

19 JUDGE: Sorry, page 20?

20 MR McCANN: Page 24 of the affidavit, Judge.

21 JUDGE: Once again my affidavit isn't numbered. Is there a paragraph?

22 MR McCANN: It's the fourth-last page. The paragraphs aren't numbered as such
23 which doesn't make it easy, but there is a heading, Judge, which might help, and
24 it's "Restriction of movement of applicable persons".

25 JUDGE: Hold on, I've "Restriction of events".

26 MR McCANN: It's just before that, Judge. It's the page before that.

27 JUDGE: Yes, all right.

28 MR McCANN: It's the page before that, Judge, paragraph one, two, three, four
29 begins, "Such section 4", do you see that, Judge?

30 JUDGE: "Such section 4", yes.

31 MR McCANN: And in fact nothing turns on it. Obviously the applicants in fact
32 mean regulation 4 or the regulations. It's not a section. Nothing turns on that. So
33 regulations 4, and these are the moving around regulations as you described it,
34 Judge, yesterday.

1 JUDGE: Yes.

2 MR McCANN: Directly affects each of us. So that's a sworn averment that there's
3 an effect on them personally.

4 JUDGE: Yes.

5 MR McCANN: And all persons, designated persons. And then by constituting a
6 direct immediate sustained interference and attack on our personal rights in
7 prohibiting our outside transport or transit outside the boundary of our home save for
8 exercise on foot and for the reasons unilaterally prescribed by the minister, therefore
9 preventing the exercise... of our personal rights to engage with persons outside of our
10 immediate household." Judge, in relation that and so on -- I'll just note the other
11 points, "Activities outside our home, no justification or cause," and then it goes on,
12 the applicants have been stopped in transit and so on. These are the points which the
13 first named applicant has been referring to today and yesterday. So, Judge, in
14 relation to that I say that there is not proper sworn evidence which establishes
15 standing for this reason, and that is that they have not actually told you in personal
16 terms how this has affected them. This is a generic --

17 JUDGE: Well I mean what would they have to put on affidavit, that we left the
18 house on this day and we were stopped by An Garda Síochána --

19 MR McCANN: Yes.

20 JUDGE: -- on the way.

21 MR McCANN: Yes, Judge. That's what I'm saying, that they haven't said
22 something absolutely straightforward and entirely within their power to say.

23 JUDGE: So in a sense then to get locus standi they have to actually disobey the
24 regulations?

25 MR McCANN: No, they don't have to do that, but they have to say --

26 JUDGE: Well, they have to leave their home to be stopped.

27 MR McCANN: Well we don't know whether they have or they haven't. It's actually
28 not that point I want to make, Judge, it's that they have failed to set out in absolutely
29 clear -- sorry, they have failed to set out in any kind of ordinary way how these
30 regulations either have affected them or may affect them. So they have not said, I
31 have been prevented from leaving my house. They haven't said that.

32 JUDGE: Well they have. They have been prevented from leaving their house by the
33 regulations.

34 MR McCANN: They say they are prohibited.

1 JUDGE: Yes. They said that, that's what the regulations say and they say that
2 affects us directly.

3 MR McCANN: Yes, but they haven't said it directly and they haven't -- and in not
4 having said it, so that's the first point, I say that goes to standing. But perhaps a
5 stronger point is as regards particularisation is that they haven't given the Court any
6 insight into how this has affected them, to use the language... in their own lives and
7 therefore it's impossible or will be impossible for the Court to carry out any
8 proportionality analysis. Then in relation to the points -- and this then goes to the
9 second part of that paragraph, Judge, dealing with the transit, interference with
10 transit, alleged interference with transit. I mean, it would have been open to the first
11 named applicant and the second named applicant to say I was stopped, I was stopped
12 on a particular day and the following happened. But they put everything into third
13 party terms and they say, and that applies to us.

14 JUDGE: All right.

15 MR McCANN: So, Judge, I'm saying these are, it's expressed in abstract third party
16 way, it's lacking in particularity, it's abstract not concrete and they are defects both as
17 regards particularisation and as regards standing.

18 JUDGE: All right.

19 MR McCANN: If I then -- sorry, I just might go back, Judge, there's one or two
20 other points I would just like to make looking at the statement of grounds but I think
21 the same point has been -- in relation -- I conceded, Judge, that regulation 4 is the
22 only place where they may have standing, but they have not met and not really
23 attempted to meet any of the standing thresholds in relation to the constitutionality of
24 the acts and they haven't said in any way how these measures affect them. They said
25 they do affect them but they haven't described in any meaningful direct way how
26 they are actually affected, either by the Health Act 2020 or the Emergency Measures
27 Act 2020. I think that's all I wanted to say, yes, in relation to the statement of
28 grounds.

29 JUDGE: Yes.

30 MR McCANN: So, Judge, we then might move, if it's convenient for the Court, we
31 might move to the affidavit which was sworn yesterday.

32 JUDGE: Yes.

33 MR McCANN: I might make the following -- so if we turn to, I can't remember now
34 whether the affidavit you have is paginated or not, Judge.

1 JUDGE: It's not, no.

2 MR McCANN: It's not.

3 JUDGE: No.

4 MR McCANN: Well, Judge, if we move in about 10 pages or so, Judge, there's a
5 heading called, "Hereinafter the Health Act" and a reference to the Health Act 2020.
6 It's about 10 pages in, Judge, in bold, bold capitalised heading.

7 JUDGE: Okay, what are you reading from?

8 MR McCANN: I'm reading from the affidavit.

9 JUDGE: Yes, I have that.

10 MR McCANN: So, Judge, if you found the heading and then you go on.

11 JUDGE: No, I say I've problems, I haven't found the heading.

12 MR McCANN: Yes.

13 JUDGE: Just give me that heading again.

14 MR McCANN: In fact, Judge, there are paragraph numbers, it's paragraph 34 and
15 then after that.

16 JUDGE: Okay, yes, I have that.

17 MR McCANN: You'll see, Judge, there there's the "health, preservation and
18 protection and other emergency measures".

19 JUDGE: Yes.

20 MR McCANN: The difficulty then is the pagination then disappears on the next
21 page, but anyway. The next page, Judge, is "Hereinafter the Health Act" and then it
22 sets out various provisions from the Health Act, you'll see that, Judge. Then it says,
23 there's a paragraph 7 there identifying how the minister had power, was conferred
24 with powers to make regulations. Do you see that, Judge?

25 JUDGE: Yes, 7.

26 MR McCANN: Yes, paragraph 7 and then it goes on in paragraph 8 and then it
27 identifies a number of -- now, just let me find the bit that -- yes, so, Judge, paragraph
28 8 is the one I want to look at.

29 JUDGE: Yes.

30 MR McCANN: They say that each of us is an application person within the
31 definition in the legislation by extension to public interest to all applicable persons
32 within the definition of the same. So, Judge, they are saying that they are an
33 applicable person within the definition of the Act and the difficulty with that
34 averment is that the Act doesn't deal with applicable persons, doesn't make any

1 reference to applicable persons. So when they say they are a special-type person --

2 JUDGE: Well, is applicable person defined anywhere?

3 MR McCANN: Yes.

4 JUDGE: And where would I find that?

5 MR McCANN: It's defined in the regulations, that's SI 121, Judge.

6 JUDGE: Okay.

7 MR McCANN: It's a term of art or a defined term that only arises in the regulations.

8 JUDGE: The regulations give effect to the restriction of movements.

9 MR McCANN: Yes.

10 JUDGE: All right.

11 MR McCANN: So, Judge, I'll just identify that, where that is now. So if we turn to
12 SI 121, Judge.

13 JUDGE: Hold on now.

14 MR McCANN: The second page of the SI.

15 JUDGE: SI 121 page, "In these regulations" okay.

16 MR McCANN: Exactly, Judge.

17 JUDGE: "Applicable person".

18 MR McCANN: "Applicable person means a person whose place or residence is
19 located within a relevant geographical area".

20 JUDGE: Well they fit that definition.

21 MR McCANN: Yes, they do.

22 JUDGE: Yes.

23 MR McCANN: But, Judge, they are saying that they have standing to challenge the
24 Act because they are an applicable person, but they are not -- an applicable person is
25 not a concept that's in the Act. So they are saying they are an applicable person as
26 the term is used in the Act. It's not used in the Act, so it's a meaningless thing to say.

27 JUDGE: Yes.

28 MR McCANN: Then it says, you know, then it says that each applicable person by
29 extension within the definition of the registration the new section 1 as inserted by,
30 and then it's not entirely clear how the following indents arise but it would appear to
31 suggest that they appear to be saying that the Act has restricted their right to travel,
32 whereas in fact it is the regulation. So they don't, they have not --

33 JUDGE: Well, it's the regulation giving effect to what's in the Act presumably.

34 MR McCANN: Yes, but it is the regulations giving effect to the Act and not the Act

1 itself. It's not the parent, in my submission it's not the parent Act. I'm saying that
2 criticism applies, they use the same formulation in relation to section 38(a) of the
3 Health Act, that's precisely the same formulation. They are an applicable person, the
4 Act applies to them. I say that's not the case for the same reason and they use the
5 same formulation in relation to the Emergency Provisions Act. So, Judge, if we just
6 turn to the section dealing with, I think it's page 17 on mine. There is a heading, if
7 we can find it, Judge, "Emergency measures in the public interest Covid-19 Act".

8 JUDGE: Hold on now a second.

9 MR McCANN: "Hereinafter Emergency Measures Act".

10 JUDGE: Yes, I have that Act now.

11 MR McCANN: Very good, Judge. You'll see then there's the preamble is quoted,
12 then it comes to part 5, emergency provision of the public interest, part 5, sections 15
13 to 22, do you see that, Judge?

14 JUDGE: Is part 5 of the Act the amendments to the Mental Health Act?

15 MR McCANN: Yes, exactly.

16 JUDGE: All right.

17 MR McCANN: If we turn to the next page then you'll see that formulation being
18 deployed again and certainly the next page in my version, there's a paragraph which
19 begins "Each of us is an applicable person".

20 JUDGE: Yes.

21 MR McCANN: So they are saying as regards the Mental Health Act as amended
22 2001, that they are applicable persons defined within the legislation, well they are
23 not, and they are potentially subject to these draconian aggressive and unnecessary
24 measures which have no function and so on and so forth. The simple point I'm
25 making in respect of the amendments to the Mental Health Act and in respect of the
26 amendments to the Residential Tenancies Act is that they haven't set out, and of
27 course they can't set out because it doesn't apply to them and there's no risk of it
28 applying to them.

29 JUDGE: Well I mean are you saying then, to challenge the landlord and tenant
30 provisions you'd have to be either a landlord or a tenant or have some direct interest
31 in a case which is before the --

32 MR McCANN: Yes.

33 JUDGE: -- Residential Tenancy Tribunal or have some case in the High Court or
34 Circuit Court where an order for possession is being sought?

1 MR McCANN: Yes, that's precisely the point I'm making, Judge.

2 JUDGE: All right.

3 MR McCANN: That's all I want to say.

4 JUDGE: Okay. Going back to the Mental Health Act, are you saying that you
5 would have to be a person who has been detained under the Mental Health Act
6 before one could challenge the changes in the tribunal?

7 MR McCANN: Yes, I think it's also the case that if you were a person who had a
8 history of mental ill health you would have standing as well.

9 JUDGE: Yes.

10 MR McCANN: Because you were then in jeopardy, potentially in jeopardy of
11 coming under the jurisdiction of the Act.

12 JUDGE: Yes, but you are saying a general citizen really couldn't do that.

13 MR McCANN: No.

14 JUDGE: All right.

15 MR McCANN: I'll leave then -- so, Judge, then in relation to facts, I'm saying that
16 as discussed, Article 84 rule 20 sub rule 3 requires the applicant to state precisely
17 each ground giving particulars where appropriate. And I'm saying that the
18 formulation and the way the applicants have chosen, these applicants have chosen to
19 structure their claim is that they have used a formula whereby they describe or recite,
20 quote some of the legislative material. They identify a certain number of
21 constitutional provisions and then they make a bare plea, Judge, I'm saying a bare
22 plea and then in their affidavit, bare averment that there is unconstitutionality. I'm
23 saying that that does not satisfy the requirement in the rules as to precision and as to
24 particularity and that no link is drawn between the Act, the impugned Act and the
25 Constitution. As discussed, Judge, the applicants must establish at the leave stage
26 that the facts as sworn must satisfy the Court that the applicants will have or do have
27 a stateable case, will have a stateable case. I'm saying in relation to the evidence that
28 the evidence put before the Court by way of the verifying affidavit, the statement of
29 grounds and now by the joint affidavit of the applicants, concludes its factual
30 narrative about the number of cases of Covid-19 in Ireland, the mortality rate, the
31 advice from the Chief Medical Officer and the advice from WHO on the 16th March
32 2020. So that's the end point including in their affidavit sworn yesterday. On the
33 other hand, Judge, Ms Ryan's uncontested affidavit from paragraph 96 onwards sets
34 out the expert deliberations of the National Public Health Emergency Team, the

1 expert views exhibited and put before the Court of the European Centre of Disease
2 Control, the considered and evidence-based advice of the Chief Medical Officer, data
3 on cases, deaths, stress on the ICU units over time, the updated advice of the Chief
4 Medical Officer on the 27th May 2020, comparative practices in the other
5 jurisdictions, the views of NPHET including on the 10th April 2020 when there was
6 a consideration given to the easing of restrictions and that that meeting addressed
7 data on the rate of new cases, community transmission and ICU admissions. And
8 Ms Ryan's affidavit identified in particular a meeting of the 10th April 2020 which
9 recommended the extension of the measures to the 4th May 2020. And thus, Judge,
10 the position is that the applicants' case ending as it does on the 16th March 2020 as
11 regards narrative was already out of date at the time of the ex parte application, the
12 15th April 2020. So, Judge, at the time of the case the applicants are making --

13 JUDGE: Sorry, the ex parte application was 15th April?

14 MR McCANN: 15th April 2020, Judge.

15 JUDGE: Yes, all right.

16 MR McCANN: So that the last factual, medical factual event which is being relied
17 on by the applicants goes back to March, 16th of March.

18 JUDGE: I think Mr Waters might well say in answer to that, well, at the time the
19 legislation was being considered and indeed enacted, the facts as of I think up to the
20 16th March, that was the situation that was facing the minister at the time.

21 MR McCANN: Yes. And of course what happens afterwards is -- sorry, first of all
22 if they wanted and perhaps arguably I'm putting no weight on this, if the they had
23 wanted to put all appropriate matter before the Court and in discharge of their
24 obligations of candour, they would have included in the material before the Court the
25 predictions to what was going to happen in the absence of measures and then the
26 predicted outcome if there were measures. Again, the Court will be aware that this
27 entered the public domain, I can't remember the detail of it but this was part of the
28 debate, the thinking of the government that without measures there'd be a very
29 different outcome.

30 JUDGE: Did the Department of Health have predictions as to what would happen
31 were the appropriate action not taken?

32 MR McCANN: Yes, I'm hoping that's in the huge bundle of material that was
33 submitted.

34 JUDGE: Yes.

1 McCANN: So, Judge, just to starkly put it, you know, put it in terms, the
2 applicants have come to court and they have said, what's this all about. There's only
3 as of the 16th March 2020 two deaths, that's the evidence. They have chosen not to
4 update that evidence, two deaths. I think last night, Judge, the total number of deaths
5 from Covid-19 was 1,339, so they are out by a factor of 500, Judge. That's the
6 evidence which they are relying on, Judge, which they are seeking the leave of the
7 Court to bring their application. Of course, and in addition, Judge, the applicants
8 late, but they put in an affidavit yesterday, as of the 5th May 2020 and they haven't
9 chosen to update the factual position for you, Judge.

10 JUDGE: Well, I raised those matters with the applicants and I think the applicants
11 said, look, if they are given leave they can update matters and they can have
12 affidavits from qualified medical experts to say what the situation is and what the
13 situation isn't.

14 MR McCANN: Yes, I think the answer to that, Judge, is that you have to be
15 satisfied now that there's evidence now which would give rise to, the facts now give
16 rise to a stateable claim on those facts for the reliefs being sought. It's simply not a
17 stateable claim to rely on no expert evidence, none whatsoever, and to rely on a
18 factual situation which is now hopelessly out of date and known to be hopelessly out
19 of date. Again, Judge, I do stress that they haven't identified any expert evidence and
20 these are matters of medicine epidemiology, statistics and these are notwithstanding
21 the ability of the applicants. These are simply matters, as a matter of law that are
22 outside their expertise. They simply do not have the expertise and they have
23 not -- they have chosen not to present any medical or scientific evidence. Just in
24 passing then, Judge, I think there was a reference yesterday to fraudulent signs, but
25 they didn't make that allegation in their statement of grounds or any of their
26 affidavits.

27 JUDGE: Yes.

28 MR McCANN: They don't have the expertise to make such a claim. So I'm saying,
29 Judge, that there are no facts set out in the affidavit which prove will provide the
30 stateable statement of grounds and the submissions by way of anecdote and hearsay
31 anecdote, people sending the applicants letters and so on and so forth, they are
32 obviously not -- add nothing to the applicants' case. Then just a number of, a small
33 number of points then, Judge, that the Court should be aware of, section 38 (a) is
34 being charged.

1 JUDGE: What's 38 (a) saying now?

2 MR McCANN: Sorry section 38 (a) is the section of the Health Act 2020 which
3 amends the 1947 Act which empowers the minister to restrict movement. It's the
4 parent Act for the moving around regulations.

5 JUDGE: Is that the MP Act or the other Act?

6 MR McCANN: It's the other Act, the Health Act 2020.

7 JUDGE: Okay. Sorry, that's it, yes, and that amends the Health Act '47.

8 MR McCANN: The Health Act '47 and then, Judge, just to note it, it's obviously a
9 different section but section 38 (a) now the Health Act 1947 is being challenged and
10 section 38 was -- so that's the original section in the Health Act which is in similar
11 but different terms was held to be constitutional by the High Court in 2009. Just that
12 the Court should be aware of that and I'll give the Court the reference. So it's a case
13 of -- Judge, what I'm saying is --

14 JUDGE: Sorry, you better tell me again, it was a section of the '47 Act which was
15 obviously challenged.

16 MR McCANN: Yes.

17 JUDGE: Could you just give me what the section was?

18 MR McCANN: Sorry, Judge, I haven't done this terribly well. So as we know,
19 Judge, the amendment effected -- sorry, I beg your pardon. The amendment effected
20 by section 11 of the Health Act 2020 is to insert -- sorry, the Health Act 2020.

21 JUDGE: I have section 11, 38 (a).

22 MR McCANN: Inserts new section 38 (a) into the 1947 Act and 38 (a) is in relation
23 to persons who are probable sources of infection.

24 JUDGE: Yes.

25 MR McCANN: And you'll remember that debate.

26 JUDGE: Yes, I do, and they can be detained.

27 MR McCANN: Exactly, Judge.

28 JUDGE: And you said that section 38 as it was in the '47 Act was challenged.

29 MR McCANN: Yes, section 38 is still there, it's in similar terms though different.

30 JUDGE: What terms? Sorry, I really just want to raise the issue with you and that is
31 that under section 38 (a) in the new Act, I suppose the new section of the Act, a
32 medical officer of health which I think is defined in the '47 Act.

33 MR McCANN: Yes.

34 JUDGE: Can effectively make an order detaining someone.

1 MR McCANN: Yes.

2 JUDGE: But the appeals procedure from that is effectively to go to another medical
3 officer of health.

4 MR McCANN: Yes.

5 JUDGE: I mean, I suppose a question could be raised given the narrow definition of
6 medical office, that in effect isn't an appeal at all.

7 MR McCANN: Yes. Well, it is to a different person, Judge.

8 JUDGE: Yes. You say the original --

9 MR McCANN: Yes, I'm just looking for that, Judge, if you just bear with me. I
10 don't think the Court has the original 1947 Act.

11 JUDGE: I took up some sections of it myself.

12 MR McCANN: Maybe you do, Judge.

13 JUDGE: For my own use I have section 2, which is the definition section.

14 MR McCANN: Yes.

15 JUDGE: I think that's the only section -- hold on, I've section 2 and section 29 of the
16 '47 Act.

17 MR McCANN: Yes.

18 JUDGE: Section 30 of the '47 Act.

19 MR McCANN: Well, Judge, I'm not making -- well, so section 38, now I haven't
20 analysed it closely.

21 JUDGE: Yes.

22 MR McCANN: But I'm simply saying to the Court that it appears to address a
23 similar situation.

24 JUDGE: All right.

25 MR McCANN: And it appears to have the same mechanisms.

26 JUDGE: Yes.

27 MR McCANN: I'm just looking for what the review procedure is. There is an
28 appeal, the patient made at any time appeal to the minister in writing to direct the
29 releases of the patient. So that's the appeal procedure. In the original section 38,
30 again it's deal with -- just beginning with the section 38 it says, "Where a Chief
31 Medical Officer is of the opinion that such a person is a probable source of infection
32 with infectious disease," so it's the same type of situation.

33 JUDGE: Yes.

34 MR McCANN: And just to note, Judge, sorry I came across it yesterday, is that

1 there is a judgment of the High Court and it's called VTS v. HSE, the Health Service
2 Executive.

3 JUDGE: Yes.

4 MR McCANN: [2009] IEHC and the Court upheld the constitutionality of the 1947
5 Act.

6 JUDGE: Okay. Thank you. Is that in your --

7 MR McCANN: No.

8 JUDGE: All right, it's not in your book of authorities.

9 MR McCANN: It's not, Judge.

10 JUDGE: Okay, very good.

11 MR McCANN: So, Judge, I just want to deal with one more substantive point and
12 then a small number of lesser points so I want to return to the question of whether or
13 not judicial review is the appropriate --

14 JUDGE: Well, if this is a substantive point, maybe we should leave that till 2
15 o'clock.

16 MR McCANN: Thank you, Judge.

17 JUDGE: And then you can deal with the subsidiary points.

18 MR McCANN: Thank you very much, Judge.

19 JUDGE: All right. Thank you very much then, 2 o'clock.

20

21 Luncheon adjournment (12.56 pm - 2.03 pm)

22

23 JUDGE: Yes, Mr McCann.

24 MR McCANN: Thank you, Judge. Judge, the function of judicial review is to
25 provide a form of supervision in relation to the decisions made in actions taken by
26 lower courts and administrative bodies to ensure that the functions conferred are
27 carried out lawfully. It's from Bealer in her third edition of Administrative Law, but
28 it's a well-known proposition and statement which will be familiar to the Court. I'm
29 saying on foot of that, Judge, as regards taking first of all statutes that any challenge
30 to the validity of a statute is to be brought and only to be brought -- sorry, any direct
31 challenge to the validity of a statute is to be brought and only brought by way of
32 plenary proceedings seeking a declaration XRY or section or part thereof is invalid
33 or repugnant to the Constitution. I say that on the contrary that judicial review is not
34 there -- sorry, the other way around, judicial review is there to supervise public

1 administration, the executive agencies and the lower courts, but it's not there, judicial
2 review is not there to supervise the legislature or the Oireachtas. Judge, I submit
3 then following on from that, that as regards ministerial regulations by way of
4 statutory instrument I submit that judicial review is not available to challenge
5 ministerial regulations also called subordinate regulation. The proper way to do that
6 is by way of plenary proceedings unless the issue arises collaterally. I just wanted to
7 open to the Court, I think this is the second-last matter which I want to open to the
8 Court and it's exhibit -- sorry, I'm looking at the wrong book. In the book of
9 authorities, Judge, it's number 12 and I think we added in -- did we add in the extra,
10 yes we did, yes. So, Judge, there's two extracts from Hogan and Gwynn Morgan.

11 JUDGE: Yes.

12 MR McCANN: Their 5th edition of their book on administrative law and the first
13 extract is paragraph 2.107, do you have that, Judge.

14 JUDGE: I have the exhibit. What paragraph is it?

15 MR McCANN: So it's tab 12.

16 JUDGE: Yes.

17 MR McCANN: And the first extract is paragraph 2.107.

18 JUDGE: Yes.

19 MR McCANN: So I'll just read this, Judge.

20 JUDGE: Yes.

21 MR McCANN: "One practical problem relates to the methods by which a statutory
22 instrument may be challenged. The normal rule is that the validity of the statutory
23 instrument should be challenged directly in High Court plenary proceedings, but this
24 question can also be raised in judicial review proceedings if it arises collaterally in a
25 challenge to the validity of an administrative decision." The authors
26 continue, "Strictly speaking we see that the validity of a statutory instrument cannot
27 be directly challenged in judicial review proceedings." Then it goes on -- if we just
28 look at the footnote there, Judge, as to the theory, the legal theory behind this.

29 JUDGE: Yes.

30 MR McCANN: "This is because the making of a statutory instrument involves the
31 exercise of legislative rather than administrative powers and hence the decision
32 maker is (probably) not amenable to certiorari or prohibition. As thus there is no
33 decision of the kind amenable to be prohibited or be quashed by certiorari, one is
34 probably" I think the binder has gone through my" one is probably not entitled to

1 seek declaration of invalidity under article 84 of the Rules of the Superior Courts."
2 And then, Judge, just while we have it open if we move on then to a later extract at
3 paragraph 18.35, it's page 1001.

4 JUDGE: Yes.

5 MR McCANN: Just looking at the footnote there, Judge, do you have that, Judge?

6 JUDGE: Yes, I do.

7 MR McCANN: I'll just read the footnote, "This point, the same point was also
8 acknowledged by Kearns J in SM v. Ireland where he said although the Supreme
9 Court in Riordan did in fact consider the constitutional issues raised in the case
10 notwithstanding the plaintiff had proceeded otherwise by plenary summons, it is now
11 well established that a statutory provision should only be challenged on the grounds
12 of unconstitutionality in judicial review proceedings if there is an underlying
13 administrator petition which is being attacked, one can then tack on a challenge to
14 the validity of particular legislation." So, Judge, I'm saying that's a clear statement of
15 the legal position.

16 JUDGE: Yes, but I mean these are all procedural points.

17 MR McCANN: Yes.

18 JUDGE: I mean, there's no suggestion that, for example, going by way of judicial
19 review in the way that the applicants have means that the Court must strike out the
20 proceedings.

21 MR McCANN: Well I think it does, Judge.

22 JUDGE: I just notice, the passages you have quoted from the Hogan book is, it
23 refers to things like strictly speaking this is the way it should be done.

24 MR McCANN: Yes.

25 JUDGE: Undoubtedly that's correct, but, you know, as you have already alluded to,
26 it is open to a Court that in, say, an application where a Court was satisfied that the
27 applicants had reached the threshold to convert the pleadings into plenary
28 proceedings.

29 MR McCANN: Yes.

30 JUDGE: In which case that would solve your problem, wouldn't it.

31 MR McCANN: Absolutely, and I can see that. I can see that.

32 JUDGE: Yes. In fact also you are actually at no disadvantage at all because had the
33 applicants started by way of plenary proceedings, you would not have the
34 opportunity at such an early stage in the proceeding to effectively have them

1 dismissed on the grounds that no arguable case has been established. So in fact it's
2 really to your benefit that they have commenced this way; isn't that right?

3 MR McCANN: There certainly are advantages that have accrued gratuitously or
4 inadvertently to the state in the defence of these proceedings, that's correct, Judge.
5 So that brings me then, I'll come back to the remedy point --

6 JUDGE: Sorry, just to conclude that part of it, I mean if I were to conclude that the
7 applicants did have an arguable case in all or part of their application, surely it
8 wouldn't follow from that, that I would have to dismiss the proceedings on the
9 grounds that they would commence by way of judicial review as opposed to plenary
10 summons.

11 MR McCANN: No, and in fact I want to just in that respect to bring your attention
12 to the rule which you can operate under, Judge.

13 JUDGE: Yes.

14 MR McCANN: I intended to do that before being asked a question, at least that's
15 what I'm saying anyhow. If we just turn to the rules and again you have tab 11 and
16 you have the SI 691, Judge. If we turn to I think it's order -- rule 25, sorry, it's rule
17 27, Judge.

18 JUDGE: Rule 27 which says --

19 MR McCANN: So it's rule 27 and then there's sub rule 5.

20 JUDGE: The tab 11 just simply has an extract of order 84.

21 MR McCANN: Yes, Judge sorry, I think we handed in separately the SI which
22 updated.

23 JUDGE: You did and I have it here. It's attached to that, is it?

24 MR McCANN: Yes, so it's at page 10, if you have the same pagination as I do,
25 Judge, page 10 of 12 of the SI.

26 JUDGE: Needless to say I don't.

27 MR McCANN: Okay, well then, Judge, if we turn to, it's order 84, rule 27, Judge.

28 JUDGE: Rule 27, yes.

29 MR McCANN: And it's two or three up from the end, two or three pages from the
30 back.

31 JUDGE: Rule 27, yes, "On the hearing of an application", yes.

32 MR McCANN: That's the one, Judge. So if you turn to the next page you'll see sub
33 rule 5 is the one which I think is relevant to the question you asked me, Judge, and it
34 says --

1 JUDGE: Unfortunately I don't have a next page.

2 MR McCANN: I'll hand it up to you.

3 JUDGE: Right, thank you. Yes.

4 MR McCANN: So, Judge, it says, "Where the relief sought is a declaration".

5 JUDGE: Yes.

6 MR McCANN: And subject to a formal amendment or the Court treating the
7 affidavit as an application for amendment, "Where a relief sought is a declaration
8 and the Court considers that it should not be granted by way of an application for
9 judicial review but might have been granted if it had been sought in a civil action
10 against the respondent or in response to any plenary summons, the Court may instead
11 of refusing the application order the proceedings continue as if they had begun by
12 plenary summons".

13 JUDGE: Yes.

14 MR McCANN: That's precisely the basis on which the Court could say that some
15 aspect of the applicants' claim establishes both standing if that was to arise, and
16 evidence likely to give rise to stateable grounds, and an arguable point of law. Then
17 in those circumstances the problem with the judicial review mechanism could be
18 solved by transferring the matter to plenary proceedings.

19 JUDGE: Yes.

20 MR McCANN: Judge, just in that regard -- so first of all you have a jurisdiction
21 under the rules, Judge, now that's provided the application for an amendment had
22 been made or understood to be made. And if we can just hand up the case there, and
23 also to the other side, Judge, that's there in the rules. But also, Judge, this just
24 confirms that you have the -- the last paragraph of this, paragraph 12 of this
25 judgment confirms that as well as having now a jurisdiction under a power under the
26 rules that in any event there was always an inherent jurisdiction conferred in the
27 court to make an order of that time. Judge, if we just might come towards the end of
28 paragraph 12, because it relates back to a point I made earlier --

29 JUDGE: Yes.

30 MR McCANN: -- at the start of my submissions. I think it's the third or fourth last
31 sentence of that paragraph. "It is beyond doubt that the issues in the present case
32 require oral evidence to be given and that witnesses will be subject to
33 cross-examination. Having regard to the complexity of the issues it seems to be
34 unlikely this could be achieved merely by cross-examining those by whom affidavits

1 are sworn, in fact counsel for each of the parties, their submissions, I believe that a
2 plenary hearing if available in law would be the appropriate manner of conducting
3 the proceedings." So I'm saying that even if there wasn't the JR point and even if
4 there was no standing point, but that just alone on the basis of the likelihood of there
5 being oral evidence required on direct examination and cross-examination of the
6 witnesses which the plaintiff has indicated a great number of witnesses it would
7 seem that they intend to call if they were given leave, that plenary proceedings would
8 be the correct mechanism because of the nature of the evidence which would be
9 heard, oral evidence, and also because discovery, more extensive discovery that's
10 traditionally available in judicial review would also be required.

11 JUDGE: Yes.

12 MR McCANN: Yes.

13 JUDGE: All right.

14 MR McCANN: So, Judge, I just then wanted to --

15 JUDGE: Even if these proceedings, if leave was refused.

16 MR McCANN: Yes.

17 JUDGE: It would still be open to the applicants to commence plenary proceedings,
18 wouldn't it?

19 MR McCANN: Yes, it would.

20 JUDGE: Irrespective of what the Court says.

21 MR McCANN: I think that's correct. I think that's correct, Judge, but I wouldn't like
22 to be seen as having conceded that if they fail to get, because I haven't actually
23 addressed it in my own mind or taken instructions on it.

24 JUDGE: I suppose like, for example, on the position on standing in judicial review
25 proceedings, I'm sure in the context of plenary proceedings the argument could be
26 made that in fact what is really being sought is really an advisory opinion of the
27 Court concerning the constitutionality in the absence of any particular facts.

28 MR McCANN: Yes.

29 JUDGE: So you are sort of back to square one then, aren't you?

30 MR McCANN: Yes. So, Judge, I just then wanted, I'll come back to one or
31 two -- yes, the point about, you know, the article 15 point about a minister can't
32 make --

33 JUDGE: Yes.

34 MR McCANN: I don't think I need to dwell on that. There are any number of cases,

1 Meagher v. the minister for agriculture, Mulcreed v. the minister for the
2 environment... de-Burke, in my submission it's established beyond argument at this
3 stage that ministers may make regulations.

4 JUDGE: Yes, well I don't think a case has been made that the regulations fall
5 outside the principles and policies enunciated in the section, yes.

6 MR McCANN: Exactly, that point is not being made. I'll leave Mr Kieran to deal
7 with the points relating to the European Convention of Human Rights obviously
8 doesn't effect direct applicability and the reference, I think in fact we put in the
9 wrong case into the book of authorities but there's a clear statement of the law -- I
10 think we replaced them. So it's the 2009 McD that was the artificial insemination
11 case. I think there were two Supreme Court judgments, so it's the 2009 one where
12 the Supreme Court deals with that. The statutory instrument points, the statutory
13 instrument act says that first of all there's no evidence before the Court that this
14 wasn't published in a timely way, I'm told that it was published in a timely way. It
15 says even if that weren't the case, the Act says it didn't affect the validity of the
16 statutory instrument, so I think that's a point of no consequence. The charter of
17 fundamental, European Union Charter of Fundamental Rights doesn't apply, this is
18 not EU law. Then I was going to come back -- I'm just going to come back, Judge,
19 and say in relation to regulation 4, yes, in fact, Judge, I think I've no further
20 submissions to make on this. They are my submissions, thank you very much.

21 JUDGE: Thank you very much, Mr McCann. Now, Mr Kieran.

22 MR KIERAN: May it please the Court.

23 JUDGE: Mr Kieran, as I hope is clear, I have read your submissions.

24 MR KIERAN: Thank you, Judge. In that event, Judge, I won't regurgitate or refer to
25 the submissions. Judge, I appear for Dáil Éireann, Seanad Éireann and an Ceann
26 Comhairle instructed by the office of parliamentary legal advisers. And, Judge, by
27 way of overview, I say that the allegations in the statement of grounds concerning
28 the notice parties are a full frontal attack on article 15 of the Constitution and on the
29 constitutional separation of powers. For that reason alone, Judge, in my submission
30 the case is not arguable against the notice parties. There are further reasons, but for
31 that reason alone. I have heard the debate with Mr McCann about converting the
32 case into plenary proceedings, and, Judge, what I say about the allegations against
33 notice parties is that even if the manner in which this judicial review could be cured
34 in some way in respect of a case against the legislation, the underlying nonjusticiable

1 of the allegations against my clients, the notice parties, is entirely incapable of being
2 cured in my respectful submission.

3 JUDGE: Yes.

4 MR KIERAN: And the reason for that, Judge, in my submission is no matter what
5 way Mr Waters and Ms O'Doherty plead that case against the notice parties, it is
6 simply a case which there is no constitutional warrant for this court to determine
7 under the well-established case law. The Court has read the submissions so I am not
8 going to go through the submissions, Judge. The, Judge, will see at page 4,
9 paragraph 9, we list out all of the matters concerning the notice parties which we say
10 are non-justiciable and regardless of how you approach the case against the state, and
11 I endorse much of what Mr McCann has to say about procedure, et cetera, but even if
12 you are minded to let the case proceed in some way, we say that the various matters
13 set out at paragraph 9 of our submissions are non-justiciable and that no leave should
14 be granted, Judge. We are inviting an affirmative statement by the Court that those
15 points are non-justiciable or not arguable.

16

17 In terms of the submissions I want to make, Judge, I want to deal with five points, all
18 of which were dealt with by Mr Waters in the oral submissions today.

19 JUDGE: Yes.

20 MR KIERAN: So he said five points against my clients. The first point, Judge,
21 concerned the Seanad and this idea that the newly elected houses have to pass
22 legislation and he referred in that regard to a document from the Oireachtas Library
23 and Research Services. Now, I don't have a copy of that myself, although I have
24 looked it up online. Mr Waters I see is reaching for copies of that, that's the first area
25 I'll address, number 1, the Seanad. Number 2, Judge --

26 JUDGE: You are getting it now.

27 MR KIERAN: -- numbers in the Dáil and the location of the sitting of the Dáil. So
28 number 2, numbers. Number 3, membership of the so-called caretaker government.
29 Number 4, and critically, the whole area of non-justiciability. I have addressed this
30 at length in the submissions, so I am going to focus on what Mr Waters said.

31 JUDGE: Yes.

32 MR KIERAN: And essentially he only referred you to two cases, Judge, and I'll
33 come to that. And then 5, miscellaneous points from Mr Waters' submissions and as
34 I say, Judge, I'm relying on the written submissions, not repeating that. So the first

1 point, Judge, is in relation to the Seanad. Mr Waters handed in a document from the
2 Oireachtas Library and Research Services. He has printed out various pages from
3 that document, but crucially, Judge, the first page of the document has not been
4 printed. I don't have a copy of it, but it's very important what it says.

5 JUDGE: What is the document anyway? How did it come into existence or what is
6 it all about?

7 MR KIERAN: What it is is, it is put together by the Oireachtas Library and
8 Research Services who are not lawyers, Judge.

9 JUDGE: Yes.

10 MR KIERAN: What it is, as is stated at the disclaimer at the bottom of the
11 document, "The Library and Research Services routinely reuses the research it has
12 undertaken for individual members to answer queries from other members or
13 research briefings for all members" and in fact Mr Waters, it's very helpful and I'm
14 very grateful to him --

15 JUDGE: All right.

16 MR KIERAN: -- passed the first page in question and I wonder is there a copy of
17 that for the judge.

18 MR WATERS: We'll get that for tomorrow, if you want we can.

19 MR KIERAN: I intend to be quite brief, I had hoped we may not need to go into
20 tomorrow, but I'll hand up the page to the Court, and I have it online. Judge, you'll
21 see the box at the bottom, the second sentence thereof, the Court won't be surprised
22 to see that it says, "Nothing herein constitutes professional advice of any kind". So
23 not only not legal advice, not professional advice of any kind and I say that this in
24 fact shows how threadbare the case of Mr Waters and Ms O'Doherty is. Judge, to the
25 extent that this document purports to put forward evidence of law, that would not be
26 admissible in this court because the Court is the arbiter of law. So what they have
27 put forward is a document which is not any sort of professional advice, I am
28 instructed the people who put it together aren't qualified lawyers, and, Judge, it is
29 merely a passing reference to the newly elected houses of the Oireachtas. Now, why
30 is this irrelevant, because as I'm sure Ms O'Doherty and Mr Waters will agree, it's the
31 Constitution that we are talking about and that has to be ruled upon here today. So
32 we have to look at the articles of the Constitution and I'll be coming to them, Judge,
33 but I've dealt with these in the written submissions and, Judge, I've dealt with them at
34 paragraphs 96 to 98 --

1 JUDGE: Okay.

2 MR KIERAN: -- of the written submissions which quote the relevant constitutional
3 articles. That's at page 29 of the submissions, Judge, where we say, if the
4 Constitution placed some limit on the Seanad's ability to legislate, it's inconceivable
5 it wouldn't say so. And directly to the contrary what article 18.8 says is that you
6 have a Seanad general election 90 days after the disillusion of Dáil Éireann, and then
7 crucially article 18.9 doesn't say the Seanad is dissolved law the Dáil --

8 JUDGE: Yes.

9 MR KIERAN: -- it says, and the Court has observed this in the interaction, that the
10 Seanad continues to is it, senators continue in office, very clear, up until the day
11 before polling day. And for good measure, Judge, I don't intend to open the affidavit,
12 but at paragraph 55 of the affidavit of Ms English, she gives examples of five bills
13 that were passed, 2002, 1997 --

14 JUDGE: Could I have a copy of that affidavit?

15 MR KIERAN: Certainly, Judge, the affidavit and exhibits are being handed in at the
16 moment.

17 JUDGE: Thank you.

18 MR KIERAN: And at paragraph 55 of that, examples were given of five bills that
19 passed during this period where you have as the applicants put it, an incoming Dáil
20 and an outgoing Seanad.

21 JUDGE: Yes.

22 MR KIERAN: But we don't accept the terminology of the outgoing Seanad because
23 the Constitution doesn't use that terminology. Judge, in fact at paragraph 102 of the
24 submissions we deal with other situations where the Constitution does refer to the
25 lifetime of a particular Dáil, that's article 16, or in article 27 where it deals with
26 legislation only taking effect after a disillusion and reassembly of Dáil Éireann. So
27 there's just no prohibition on legislation being passed by what's being called the
28 outgoing Seanad and all my friends pointed to illustrating how unarguable their case
29 is, is a document which isn't legal advice which is a very in passing reference.

30 JUDGE: All right.

31 MR KIERAN: So that's all I intend to say on that matter, Judge.

32 JUDGE: So effectively the Dáil is elected, the Seanad elections have to take place
33 within 90 days but until those elections take place, the senate is the senate.

34 MR KIERAN: Absolutely, Judge, the Constitution is crystal clear on that and the

1 attempt to argue otherwise is an attempt to go behind or amend the wording of
2 Bunreacht na hÉireann in some way.

3 JUDGE: At no point in fact the senate is actually dissolved, you simply move from
4 one senate to the next senate?

5 MR KIERAN: What happens, Judge, is the senate continues in office up until the
6 day before polling day.

7 JUDGE: Yes.

8 MR KIERAN: So in a Dáil election there is the dissolution and the Dáil is dissolved
9 during a general election apart from one exception which I think happened in the
10 1940s under the Emergency Powers Act. The senate, you don't have that dissolution
11 for the election period, the senate continues to is it up until the day before polling.

12 Then what has to happen is a new senate has to be convened, the Taoiseach sets the
13 first day for that and we are not concerned with any of that, about the 26th Seanad --

14 JUDGE: Yes.

15 MR KIERAN: -- because here, Judge, the last date in their statement of grounds
16 concerning my clients is the 27th of March 2020.

17 JUDGE: All right.

18 MR KIERAN: And manifestly on that date the Seanad was still sitting. So
19 essentially what the Court has said is correct, the Seanad is the Seanad up until the
20 day before polling, which here the day before is the 29th of March. If I might move,
21 Judge, to the second theme which is numbers in Dáil Éireann and I have five points
22 to briefly make in this regard, Judge. First, while reduced attendance in the Dáil
23 Éireann I accept is at issue in the statement of grounds, what I did not detect, subject
24 to correction from Mr Waters, in the statement of grounds was the proposition "The
25 Dáil should have moved to another location like the convention centre". That was
26 said today, subject to correction that case is not before you. I endorse everything
27 Mr McCann has said on order 84, rule 23, which is the Court is giving leave on
28 particular grounds, they are obliged to particularise it. The first we heard of that case
29 was this morning. So I say the proposition of going to another venue isn't in the
30 case.

31 JUDGE: I don't know if it's -- maybe it is relevant, does a Ceann Comhairle in fact
32 have the power to tell a deputy, leaving aside matters of discipline and so on and so
33 forth, that you are not to be in the Dáil today?

34 MR KIERAN: Not to my knowledge, Judge, and I'll come to what happened here in

1 this case and it's not gainsaid, but it wasn't the case that the Ceann Comhairle
2 directed reduced attendance.

3 JUDGE: Yes.

4 MR KIERAN: What happened was the Business Committee which has power under
5 the statutory standing orders in terms of regulating arrangements in the house and
6 any other matters, agreed to the principle of reduced attendance. So certainly there
7 was no instance here of the Ceann Comhairle saying you won't come in.

8 JUDGE: So if a deputy turned up and said I've heard what you say Ceann
9 Comhairle, but in fact I've been I elected and I want to take my seat in the Dáil and I
10 want to make a speech, there's nothing the Ceann Comhairle would do about that, is
11 there?

12 MR KIERAN: It doesn't arise in this case, Judge, so it's a hypothetical. However,
13 I'll answer that question to say I'm not aware of it and we have checked and it's
14 averred to in the affidavit, with the clerk of the Dáil who has confirmed that on the
15 dates referred to no deputy was inhibited from coming into the house.

16 JUDGE: Yes.

17 MR KIERAN: But it is the Business Committee, it isn't the Ceann Comhairle's
18 matter. So that just simply doesn't arise, Judge. That's my second of the five points
19 of reply to this idea of reduced attendance is that paragraph 19 of Ms English's
20 affidavit says that the members of the Dáil Business Committee, it's a formal
21 committee established under standing orders, representative of all political parties,
22 one representative, Judge, and the three technical groups of independence have one
23 representative on the Business Committee and every member of the Dáil is a member
24 of either the political parties or one of the three technical groups. Their
25 representatives decided unanimously, unanimously to the proposals of the Ceann
26 Comhairle, and we have exhibited the email, it was only the proposal. Judge, that
27 answers that point, I say. The third point I'd make, Judge, is in relation to the
28 Constitution and article 15.11.3 thereof. I have quoted this at paragraph 81 of the
29 submissions, or the Court may prefer to look at it in the Constitution itself, it's
30 15.11.1 and 3 which are the most relevant. 15.11.1 says that, "All questions in each
31 house shall, save as otherwise provided, be determined by a majority of the members
32 present and voting other than the chairman or the presiding member"; and subsection
33 3, "The number of members necessary to constitute a meeting of either house for the
34 exercise of its powers shall be determined by its standing orders." Now, in fact that

1 subsection expressly permits and arguably even envisages reduced attendance, that
2 there will be an attendance of less than a full attendance. Here, the statement of
3 grounds the complaint it makes is the Ceann Comhairle proposed 48 TDs would be
4 in attendance and we have referred in our affidavit to order 21 of the standing orders
5 which says the quorum is 20 and before noon it's 10. So even on the figures they
6 have referred to, well in excess of quorum. The fourth point, just dealing again with
7 this issue of reduced attendance, is this is a matter for the houses themselves, Judge,
8 and if I can refer briefly to one case in this regard, it's to be found at -- well, we have
9 a book of authorities and it's in the book of authorities which has been handed in,
10 but, Judge, I propose in ease of you to just refer to the passage in the written
11 submissions if you prefer.

12 JUDGE: Yes.

13 MR KIERAN: And that's to be found at paragraph 32 of the written submissions.
14 It's a case of Haughey v. Moriarty. It's at page 12, paragraph 32 where Mr Justice
15 Geoghegan said, originally the plaintiffs -- the Court will recall this was the former
16 Taoiseach, Mr Haughey and I think various members of the various Haughey family
17 were challenging the Moriarty tribunal and one of the grounds is set out here, page
18 16, "Originally the plaintiffs allege neither the Dáil nor the Seanad were properly
19 convened. At a later stage the claim the Dáil was not properly convened was
20 abandoned. The claim the Seanad was not properly convened was persisted with. At
21 the hearing I decided to rule out all evidence directed to showing there was some
22 irregularity for the convening of the Seanad for the purpose of the resolution as it
23 seemed to me these matters were not justiciable in the courts on the grounds of the
24 constitutional separation of powers. The Dáil and the Seanad regulate and enforce
25 their own procedures." So I say, Judge, that governs various of the propositions
26 here. The Dáil regulates its own procedures including that of attendance. And then
27 the fifth point, very briefly on numbers which I'll make, Judge, is at paragraph 60 of
28 Ms English's affidavit she gives ten examples by reference to the European centre for
29 parliamentary research and documentation, ten other examples of other
30 parliamentary chambers which have operated with reduced numbers during the
31 Covid-19 crisis. So it's not just something that's internal to Ireland, it's also how
32 other parliaments have regulated their procedures.

33

34 I'll move on to the third point, Judge, which is membership of the so-called caretaker

1 government. I say so-called caretaker government, Judge, not because we are
2 disputing the situation which arises because merely because the phrase "Caretaker
3 government" isn't used in the Constitution. My reply to this, Judge, I have just three
4 points to make in this regard. First and in common with the convention centre point,
5 I didn't see this point in the statement of grounds, subject to correction. There are
6 other points in the statement of grounds which I'll come to, but not the point that
7 Mr Shane Ross, Ms Regina Doherty and Ms Katherine Zappone were not re-elected
8 at the general election and that somehow renders the government infirm, a point that
9 was made. I'm not even sure if that point would be against me as the notice parties,
10 so I am just going to address the legislation. But that isn't a point in the statement of
11 grounds. What the Court sees in the statement of grounds, and this is addressed at
12 paragraphs 92 to 94 of our written submissions, is the unstateable and somewhat
13 scandalous allegation that the current Dáil is a caretaker Dáil, the elected members of
14 the people. We say that's unstateable for the reasons set out and certainly isn't the
15 sort of point on which the Court should say there's an arguable case in common with
16 the other points made. Furthermore, Judge, the second point I'd make in respect of
17 the caretaker government, article 28.11 is very clear and the Court has referred to this
18 already, the members of the government stay in office until their successors are
19 appointed, which hasn't occurred as of yet, and the Taoiseach continues to carry on
20 his duties. So that's a very specific article. They have referred to other articles of the
21 Constitution which are more general saying that TDs must be members of the
22 government, but 28.11 is very specific. At paragraph 94 of our submissions we refer
23 to commentary which is Kelly's Irish Constitution saying there are no constitutional
24 limits on the powers of a caretaker government. There may be points and in fairness
25 Hogan and White do make a point that a caretaker government should exercise
26 prudence politically. That's a political matter, it's not a legal matter. Then the final
27 point I'll make about the caretaker government, Judge, and it's an important point,
28 from if my review of the Constitution, and as I say this is just a point that Mr Waters
29 made this morning, there's no constitutional requirement that for legislation to be
30 effective it must actually be proposed by the government, a government of any kind,
31 with two possible exceptions that I can discern. First in article 17.1 it refers to a
32 message signed by the Taoiseach where appropriation of revenue --

33 JUDGE: This is the money bill point, is it?

34 MR KIERAN: Exactly, Judge. And secondly, article 24.1 which I have referred to

1 in the submissions, refers to the Taoiseach again certifying that bill is urgent because
2 of the emergency situations that are referred to there. Apart from those which don't
3 even say that the bill must be initiated or passed or proved by the government, there's
4 no requirement that legislation must be put forward by the government. So
5 Mr Waters' and Ms O'Doherty's argument that the so-called caretaker government
6 somehow imperils the legislation in respect of which they seek certiorari has no
7 constitutional merit at all in my respectful submission, even if it were in the
8 statement of grounds, which I don't accept it is. There's reference to the caretaker
9 Dáil and the newly elected houses, that's a different point. The fourth point, Judge, is
10 the whole area of justiciability and this is a very important point because it governs
11 everything concerning my clients and rather than rehashing the various cases in the
12 written submissions, I'm not going to do that, Judge, I stand over all of them, let's
13 look at what Mr Waters said today on this important point of justiciability and he
14 made I think four points. First of all, when asked by you, Judge, he said let's have a
15 debate about non-justiciability once leave is granted. That's not an answer in terms
16 of an arguable case. Later and on a related point he said the issues regarding the
17 Oireachtas should be "postponed" until the substantive constitutionality of the bill.
18 When challenged by you, Judge, there was no reason given by him why that should
19 be postponed. He then referred to article 15.4.1 of the Constitution which refers to
20 an Act being repugnant to the Constitution if it's unconstitutional effectively. That is
21 germane to the legislation itself, Judge, now how it got passed and every challenge,
22 every instance where a law is struck down as un-constitutional is by reference to that
23 argument, but that's enacted laws. And the Court will see in our submissions we
24 refer to article 25.4.1 which says when the President signs a bill it becomes law. So
25 then that's a case concerning the state. And then, Judge, we come to the only two
26 cases that the applicants have put before you on the justiciability question, what were
27 they? They were Denis O'Brien v. the Clerk of Dáil Éireann and the Joanna Cherry
28 case in England and I'll address each of those in turn. The Denis O'Brien case, it's in
29 the book of authorities, Judge, but if the Court perhaps go to paragraph 30 of our
30 written submissions, I don't need to dwell on this because the Court in fact directed
31 Mr Waters' attention to it. But Mr Waters attempted to argue oh this is an
32 exceptional case and therefore grant us leave. As will be seen in Ms Justice Ní
33 Raifeartaigh's summary of the O'Malley case and borne out by the O'Malley
34 judgment of the Supreme Court itself, even the two examples given which were the

1 Oireachtas not holding a session, one session in a year, and the Dáil not meeting
2 within 30 days of the general election, even in such extreme cases Ms Justice Ní
3 Raifeartaigh says that it is not clear whether even in those extreme situations the
4 Court would intervene. So how is this case exceptional or extreme? The fact that
5 the business in terms of how it concerns the applicant, certainly Ms O'Doherty and
6 Mr Waters may say the case is exceptional in terms of the subject matter of the
7 legislation, and I'm not here in that regard. But in terms of what happened within the
8 house, what's so exceptional about the business --

9 MS O'DOHERTY: The country is under mass house arrest. You should be ashamed
10 of yourself.

11 JUDGE: Ah now, Ms O'Doherty, please come on. Thanks.

12 MR KIERAN: In terms of what's so exceptional about the Business Committee of
13 Dáil Éireann deciding in an exceptional situation how to reduce the attendance, a
14 matter both within standing orders and within the Constitution, very different, Judge,
15 are the two matters referred to in the O'Malley case of the Dáil not meeting at all.
16 And that segues that issue of whether the courts would intervene even when the
17 Oireachtas didn't meet within the general election, segues into the Joanna Cherry
18 case where it is correct that the UK parliament granted relief in respect of the
19 prohibition of parliament. What I say in respect of that, Judge, is first of all query,
20 and I merely raise the question whether the passage in O'Brien non-justiciability
21 would lie there or not, I don't need to argue that point one way or the other, but I just
22 raise the query. I say the Cherry case is distinct for three reasons, Judge. First, a
23 different constitutional system; second, a different legal basis; and third, different
24 factual situation.

25 JUDGE: Is there any system or provision in this jurisdiction for the proroguing of
26 parliament?

27 MR KIERAN: For parliament to be prorogued?

28 JUDGE: Yes.

29 MR KIERAN: Off the top of my head, Judge, I think the houses themselves can
30 decide to go into recess which they do --

31 JUDGE: Yes.

32 MR KIERAN: -- over the summer, and that's a decision that the houses themselves
33 make, not that the executive power makes.

34 JUDGE: Yes.

1 MR KIERAN: There is the provision that we have referred to whereby the
2 Taoiseach sets the date of the first meeting of the Seanad, but that doesn't arise.

3 JUDGE: I just seem to recall that when the house of parliament were being
4 prorogued in the United Kingdom that the privy council had to be consulted or the
5 Queen had to be consulted. There seemed to be sort of a very fixed number of
6 constitutional steps that you had to take which don't seem to have any application in
7 this country.

8 MR KIERAN: Precisely, Judge, and that leads me to the second point which I'll
9 maybe deal with now. In the Cherry and Miller case what was being attacked or
10 judicial reviewed was the government advice to the British monarch to exercise the
11 royal prerogative in respect of prorogation and the Court is absolutely correct in
12 saying that that has no analogue whatsoever in respect of the Irish judicial system.
13 And indeed in respect of judicial review and I regret I don't have a copy of the case,
14 I've looked at it online, Mr Waters relied on it, but at paragraph 52 of the judgment,
15 what the UK Supreme Court say, the first two sentences of paragraph 52, I might just
16 read them out, Judge, the courts say, "Returning to the question of the justiciability
17 of whether the prime minister's advice to the Queen was lawful. We are firmly of the
18 view that it is justiciable as we have explained it is well established and is accepted
19 by council for the Prime Minister that the Courts can rule on the extent of
20 prerogative powers." Do prerogative powers arise under the Irish Constitution, I
21 believe there's a mention in article 49 of certain prerogative powers, treasure-trove,
22 et cetera, being carried over where they are not inconsistent with the Constitution.
23 But here, and this leads me into the different constitutional system point, here how
24 parliament is convened, et cetera, is governed by article 15 of the Constitution. And
25 another thing article 15 of the Constitution does, which the British constitutional
26 system doesn't, is it sets out specific immunities of parliament including the freedom
27 of debate, standing orders, those are matters for Dáil Éireann. Utterances are
28 non-amenable, et cetera, and very briefly, Judge, at paragraph 39 of the Cherry and
29 Miller judgment, there is reference to the flexibility of the UK Constitution because
30 the UK doesn't have a written Constitution. That's what they Supreme Court referred
31 to. Very different here where deliberate choices are made and this is attorney
32 general Hamilton number 2, to put certain matters off limit the courts. And then
33 finally, Judge, why is the Cherry Miller case distinct, they were different facts. So
34 there the issue was that the government was preventing parliament from meeting.

1 Here there's no question of parliament being prevented from meeting, rather the
2 Business Committee has unanimously decided that reduced membership will attend.
3 That decision was unanimous and it was interesting that Mr Waters in passing this
4 remark said yesterday that himself and Ms O'Doherty as journalists had people
5 approaching them because they couldn't go to their politicians because their
6 politicians were "of the one mind". That's what Mr Waters said to you yesterday. It
7 actually corroborates the point that the politicians believe there should be reduced
8 attendance. So, Judge, that -- I rely on the other points in the written submissions
9 which say this is clearly non-justiciable, but even the points Mr Waters has put up
10 have no merit. Then finally, Judge, other points which might be made briefly,
11 miscellaneous points of Mr Waters. First of all he says the legislation has been
12 rushed through the houses, he said that today. And yesterday, Mr Waters said, these
13 matters should have been "thrashed out in the Dáil and Seanad." And I don't mean to
14 belabour the points, but paragraphs 84 to 89 of our written submission deal with the
15 whole issue of debate in parliament, Judge. Paragraph 86, the *Blascaod Mór* case
16 says the courts are concerned not with the speed of passage of the legislation but it's
17 constitutionality and indeed at paragraph 88 I have referred to the Court of Appeals
18 judgment in *Moore v. Minister for Arts* and the sentence at the very end is relevant,
19 Judge, "There are no legal standards which can guide the judicial branch in any
20 determination of what monuments should be matters of national importance".
21 Applied here, that means there's no standards that can guide you, Judge, on whether
22 there was minimal debate, too little debate, too much debate, et cetera and over the
23 page just as a vignette paragraph 89 notes that the Emergency Powers Act of 1940
24 referred to by my friends, that passed the Dáil in a few minutes the time fall of
25 France. Mr Waters referred to reduce quotient in the Dáil, I have dealt with that.
26 Mr Waters referred to the Ceann Comhairle's direction, it wasn't a direction as such.
27 Then one point and probably it's my own failing, Judge, that I'm slightly confused
28 by, but Mr Waters referred to certain paragraphs, I think it was 89 and 90 of the
29 affidavit of Bernadette Ryan to say that the bill was published earlier on later on the
30 16th. That may tie in with the point of the Ceann Comhairle's foreknowledge
31 perhaps which I have addressed in the written submissions, I'm not clear how that
32 could cast any possible constitutional infirmity on what occurred within the houses,
33 but for the avoidance of doubt, Judge, various charges are made against the Ceann
34 Comhairle's utterance. There is no merit to the point the Ceann Comhairle exhibited

1 any bias even if that point were justiciable and of course it's the very quintessence of
2 non-justiciability because it's concerned by an utterance of a member, and he is a
3 member of the houses in respect of which there's no jurisdiction. So unless the Court
4 has any questions.

5 JUDGE: Yes, thank you Mr Kieran.

6 MR KIERAN: Thank you.

7 JUDGE: Now, Mr Waters.

8 MS O'DOHERTY: I'm actually going to respond, Judge, if you don't mind.

9 JUDGE: Not at all.

10 MS O'DOHERTY: It would appear, you know, given the content of that particular
11 speech, in particular, Judge, that we are here to discuss a row over a garden fence. I
12 want to remind all of you here, all of you bar three people, that the people who are
13 paying for you to be here today are today under house arrest. Their elderly relations
14 are dying alone denied the right of their family at their death beds. They are in
15 hospital alone. The people who pay your wages can no longer get access to normal
16 health care.

17 JUDGE: Ms O'Doherty, I have mentioned this to you on several previous occasions,
18 but it does seem to me than rather than a submission in reply to the points that have
19 been made against your application, you are embarking on a speech.

20 MS O'DOHERTY: Well, as you always say, Judge, but I want you to know that you
21 seem in here to be operating in a bubble. You want me to stand up here and give you
22 case law after case law after case law. I would suggest that you are well aware that
23 we are lay litigants and we have made it very, very clear that -- I want to stress that
24 at the outset. I do believe I am within my rights to remind you of that. The public
25 are watching this case very closely.

26 JUDGE: Yes.

27 MS O'DOHERTY: Many of them outside, you know, hundreds of them in the last
28 few days have tried to get to this hearing. They have been stopped on trains and
29 busses. This is if not the most important, one of the most important cases to be heard
30 and I am going to finish this aspect of what I want to say. The leaving cert and
31 junior cert students whose lives have been thrown into disarray as a result of this
32 legislation, all of the people now who go into their cars every day and are terrified,
33 good law-abiding citizens are terrified of being stopped at garda checkpoints.
34 Outside there today, Judge, there's probably about a hundred gardaí. Not only is this

1 hugely defamatory of us here --

2 JUDGE: Again, Ms O'Doherty, this is really of absolutely no assistance to me in
3 reaching a decision as to whether or not you have reached a threshold of arguability
4 in your judicial review proceedings.

5 MS O'DOHERTY: It is because I believe that we have been here --

6 JUDGE: It is simply a speech and also, Ms O'Doherty, I really do not want you to be
7 using the court for the purposes of making political speeches.

8 MS O'DOHERTY: It's not political.

9 JUDGE: By all means make legal submissions, but not political speeches. The court
10 is not the place for that.

11 MS O'DOHERTY: It is not political.

12 JUDGE: And you know that as a journalist.

13 MS O'DOHERTY: I represent the public interest because my vocation is about
14 serving the public interest, just as yours, Judge, is about serving justice and the truth
15 and upholding this book, Judge, all right. Now, this individual here, counsel for the
16 state, has accused us time and time and time again of not having locus here today.

17 JUDGE: Yes, now let's deal with that.

18 MS O'DOHERTY: Yes, let's deal with it but I guess a very important backdrop, that
19 this is not about a garden fence, it is about the fact that all the citizens who pay your
20 wages are on mass house arrest. Now, I came in here this morning and I outlined
21 once again how I personally had been stopped on my way. You say, Judge, I'm not
22 allowed to give anecdotes, yet this counsel for the state on my right says he does
23 want anecdotes. So which way is it? What are we supposed to do? I can give you
24 thousands of anecdotes. I can go right back to my own career, because you want
25 local, you want me to give evidence as to why I personally am affected, let me tell
26 you why. I spent 20 years in the Irish Independent. I was covering garda corruption
27 primarily. I had several murders reopened and child abuse cases that have been
28 covered up by An Garda Síochána and the state. As a result of my work on those
29 cases --

30 JUDGE: Ms O'Doherty, I'd really prefer if you again --

31 MS O'DOHERTY: I'm coming to it.

32 JUDGE: -- weren't using the court to rehearse the high points of your career.

33 MS O'DOHERTY: It's not a high point.

34 JUDGE: I think it would be much more relevant and much more useful to the Court

1 if you might deal with the submissions which have been made against me to
2 persuade me not to grant you leave to seek judicial review. Nothing you have said so
3 far --

4 MS O'DOHERTY: I'm coming to --

5 JUDGE: Excuse me, nothing you have said so far in any way deals with the
6 submissions that are being made against you.

7 MS O'DOHERTY: Judge, I'm not allowed to speak. I am trying to give an example.
8 I spent a lot of time in recent years challenging the gardaí successfully. The last
9 people I want to encounter, believe you me because the last time I personally came
10 to these courts was because I lost my career of 20 years as a result of the direct
11 interventions of An Garda Síochána with my employer Denis O'Brien and I had to
12 come here to get justice, which I did get and I'm hoping I'm going to get it here today
13 again. The last people I want to meet when I go about my business, Judge, every
14 single day are the gardaí. My life is devastated by them because I lost my career
15 defending the public interest. I today have been stopped probably by six gardaí on
16 two occasions. I had to walk through about ten of them to get into this court. This is
17 deeply traumatizing for me and I'm well able for it.

18 JUDGE: Ms O'Doherty, at any point do you propose dealing with the submissions?

19 MS O'DOHERTY: I am dealing with the submissions.

20 JUDGE: Well, I have to say it doesn't appear to me that you are.

21 MS O'DOHERTY: You want individual examples of how we are personally
22 affected.

23 JUDGE: No I would like you to answer the legal points that are being made against
24 you.

25 MS O'DOHERTY: You want me to quote case law, I'm not going to do that.

26 JUDGE: All right.

27 MS O'DOHERTY: I'm sorry. If you are not capable of making your own case law,
28 Judge, in this position because we know that there is no precedent for this in
29 independence. There is no precedent. The Irish people have never been put under
30 mass house arrest. I would say all the case law in the world at this point which I am
31 not able to quote, I admit that, I am not a lawyer. I am a journalist to who has
32 devoted her life to defending the public and I personally am affected every time I go
33 out. I am stopped. I am detained, Judge.

34 JUDGE: Yes.

1 MS O'DOHERTY: I am detained.

2 JUDGE: And that point has been made that you are, as it were, a person in respect
3 of whom at least some of these regulations directly affect you.

4 MS O'DOHERTY: Counsel for the state has suggested that I am not going to be
5 affected unless I get arrested, okay.

6 JUDGE: Yes, and you say no, that's not the case because I as a citizen am stopped
7 regularly pursuant to these regulations; isn't that your point?

8 MS O'DOHERTY: That is my point.

9 JUDGE: Okay, very good. I have that point.

10 MS O'DOHERTY: And I am detained regularly.

11 JUDGE: Could we possibly now move on from that point to deal with other matters.

12 MS O'DOHERTY: Okay. Thank you. Well there are many other aspects, for
13 example I have been denied the right to practice my religion. I have been incapable
14 of going to mass for the last two months or receiving holy communion which is very
15 important to me.

16 JUDGE: Yes.

17 MS O'DOHERTY: The first Easter Sunday in my entire life, I did not receive holy
18 communion, that means a lot to me as it does to many other members of the Irish
19 public, many of them. I have been denied the right to access to my family, to
20 members of my family. This is an infringement of my constitutional rights. I have
21 been denied the right to freedom of assembly. I am in the process of establishing a
22 political party, Anticorruption Ireland which has several thousand members already.
23 I have been denied all of that. We have just come out of a gruelling campaign for
24 which we are trying to rid this corruption-infested state of all of the criminality that
25 is involved in it and we are unable to do this. We are unable to build our new
26 political movement because of the restrictions and I would say that is a major issue.
27 As far as having personal standing is concerned, we have outlined it. You want us to
28 discuss the substantive issue here, the hearing. You want us to hold the hearing now.
29 All of these specific anecdotes will be discussed at a later date, be it in this hearing
30 or if we have to appeal. But they will be. I believe that it is not fair for us to have to
31 go into the detail of all the specific incidents of this case at this level, at this stage.
32 We will if you wish and we can furnish the Court with additional affidavits.

33 JUDGE: I am just wondering, Ms O'Doherty, was there any specific reason why,
34 and you seem to accept this in your grounding affidavit, medical evidence

1 concerning the prevalence of the virus, the fatality rate simply was completely
2 absent, not there at all.

3 MS O'DOHERTY: Because it is our understanding, Judge, that we applied on an ex
4 parte basis and it was our understanding that the substantive issues in regard to this
5 would be heard during the actual judicial review. As I say, we are not lawyers. If
6 you wish for us to bring in consultant scientists, doctors, judges from the UK now at
7 this level, we can do that, that's no problem. We have them. We've got them. We
8 are going to have them. That's okay. But I would say that that is not fair and I will
9 remind once again that the taxpayers who are 200-and something billion at this stage
10 because it's going up by the billion every hour I suspect at this stage, in debt, 50,000
11 on every single man, woman and child, we are wasting time in this process, Judge.
12 We should have been granted leave by now and we are going to have to repeat all of
13 this paid for by the taxpayer when we get leave, which we very much intend to do
14 and we will go as far as Europe because there's absolutely no doubt that this --

15 JUDGE: I see. We'll just deal with the matters as they stand in this Court. You
16 have dealt with the locus point. You have certainly informed the Court very clearly
17 as to how these regulations directly affect you. You have dealt I think with the point
18 that you didn't put any medical evidence into your grounding affidavit on the basis
19 that I think you said it was a mistake or it was an error; is that right?

20 MS O'DOHERTY: No, it's not an error. It is that -- well, first of all we believe we
21 have standing because we are experts in the sense that we are journalists. We were
22 reporting --

23 JUDGE: Oh.

24 MS O'DOHERTY: -- on these matters --

25 JUDGE: I see.

26 MS O'DOHERTY: -- for our entire careers. Both Mr Waters and I have ample
27 expertise in establishing the facts around certain issues in society, be it in relation to
28 health, education or so on. So I think that in that regard our evidence stands alone.

29 JUDGE: All right. That's based on you being investigative journalists.

30 MS O'DOHERTY: Well I explained to you yesterday that I have expertise in health
31 in particular. I have won awards for same.

32 JUDGE: All right. Okay.

33 MS O'DOHERTY: And we have gone through with a fine-tooth comb the evidence
34 of international experts that the state's case is based on a hill of beans because I can

1 show you graph after graph after graph how lockdown, lockdown is harming the
2 public now. Lockdown is killing economies, it's destroying our already broken
3 economy. It's resulting in suicide going through the roof. I can tell you that, Judge,
4 but if you wish we can bring in the experts at this stage or we can get affidavits, but I
5 would have said that was at a later date.

6 JUDGE: All right.

7 MS O'DOHERTY: Okay. So the reference in relation to fraudulent science.

8 JUDGE: Yes.

9 MS O'DOHERTY: Of course, you know, it is fraudulent.

10 JUDGE: It's fraudulent because you say so; isn't that right?

11 MS O'DOHERTY: No, because the medical experts say so, and that is for a later
12 date.

13 JUDGE: I see.

14 MS O'DOHERTY: But there's absolutely no question already that we can prove and
15 we said it yet, that the registration of deaths is dubious because the coroner can
16 register a death without the deceased being tested for Covid-19. These are on the
17 Department of Justice, the coroner.ie website. They admit to this. So many of these
18 debts and is it fair to say the average death is up in the 80s. We know that about a
19 hundred people die in Ireland every single day anyway and there doesn't seem to be
20 any significant jump in mortality from this period of the last four months to 2019. I
21 think if anything John, the mortality rates are lower.

22 JUDGE: I see.

23 MS O'DOHERTY: Lockdown, coronavirus --

24 JUDGE: I think at the moment you are purporting to give evidence yourself, aren't
25 you?

26 MS O'DOHERTY: I am purporting to, I'm attempting to answer the points raised. It
27 is fraudulent, we will be very much -- we can do that as part of this process, prove it
28 as part of this process or we can prove it during the hearing which is what we
29 understood was our entitlement. That was, we thought that was the location in which
30 we should do that. There was a reference to the breaking and entering of the rights
31 of the gardaí to break and enter into a private home, private property. This is not
32 only stated by the World Health Organization by an Irish man who I believe is
33 actually the number 2 in the World Health Organization. He used those very words
34 and it is the World Health Organization which informs much of what the state is

1 doing in harassing citizens every single day of the week. But I also believe that the
2 breaking and entering reference is mentioned in the legislation. As far as that is
3 concerned, we certainly do believe we have standing, not only from the personal but
4 also because it's in our vocations, in our professions we represent the public interest.
5 We also believe that much of this is for the substantive hearing. I am just going -- I
6 think Mr Waters is going to address this in slightly more detail, but just as far as the
7 counsel for the Ceann Comhairle, Dáil and Seanad is concerned, it was, I remind the
8 Court, the state's idea to bring the Ceann Comhairle, Seanad and Dáil as separate
9 notice parties. I'm not really sure why that was done. This was the first thing that
10 was stated to us when we entered into court by yourself over there, I think,
11 Mr Meehan, when this process began many weeks ago now. We are heading into a
12 month, it's unbelievable this has been dragging on for a month now while the
13 population is under house arrest. We would have thought that the attorney general
14 and Ireland were the appropriate parties to deal with what went on in the Oireachtas
15 during this period. So, we are not really sure why exactly those three extra parties
16 were added when Ireland and the attorney general and the state could be dealing
17 directly with all of those issues. We have a question mark, we have a very serious
18 concern in relation to that which may and hopefully will not emerge. But we do
19 hope that it's nothing to do with extra cost that might be thrown at us at some point.
20 All of the wonderful case law that has been quoted, fantastic, okay, but we are in a
21 situation where we do have a caretaker government which has been fundamentally
22 rejected by the Irish people. We have a Taoiseach who resigned about three months
23 ago and we have a scenario, Judge --

24 JUDGE: Well that's -- I mean is it not the case that the Constitution explicitly state
25 that is the Taoiseach resigns but continues in office until a new Taoiseach is elected.
26 Is that not exactly what the Constitution says?

27 MS O'DOHERTY: The problem is --

28 JUDGE: Sorry, would you disagree with me, is that what the Constitution says?

29 MS O'DOHERTY: Could you please repeat what you said, Judge.

30 JUDGE: The Constitution says that the Taoiseach who loses the majority of the Dáil
31 resigns but continues in office until a new Taoiseach is elected. That's I think what
32 the Constitution says fairly clearly.

33 MS O'DOHERTY: What the Constitution says is many other things, it says many
34 other things. It say that is the Oireachtas shall not enact any law that is repugnant to

1 the Constitution and, Judge, we have been here for almost four weeks telling you
2 how our fundamental rights are breached. Just in relation to plenary summons, sorry
3 this slipped my mind, what the state wants to do is to narrow this down, narrow it
4 down. Okay, so Gemma O'Doherty has permission to leave her house now, or
5 Gemma O'Doherty can go to mass, we'll strike that one out. No, no, no. The reason
6 we have taken a JR and not gone the plenary route is because we want, we want a
7 declaration of unconstitutionality. We care. We are doing this not for ourselves, we
8 are doing it for the Irish people who are very relevant, who own this courtroom. So I
9 just wanted to make that clear.

10 JUDGE: Yes, well I think you have told me that on a few occasions before. I heard
11 you on that. Again, as I said to you on numerous occasions, this really isn't of any
12 great assistance to me in deciding whether or not you have an arguable case.

13 MS O'DOHERTY: Well, we are stating that we don't want, I'm not sure -- I can't
14 believe that you would say that, Judge. We do not want to go down to the very
15 localised personal plenary summons route because we want all of this legislation
16 deemed to be declared un-constitutional because it is and it is so utterly repugnant to
17 Bunrecht na hÉireann. So the problem, though, if we do, I understand that you have
18 to disavow Quays law, I understand that. But there's a much bigger picture at play.

19 JUDGE: I mean, I presume you are not suggesting to me that I shouldn't have regard
20 to case law?

21 MS O'DOHERTY: I'm sorry, I'm talking to --

22 JUDGE: If you are talking to me on that point, are you suggesting that I shouldn't
23 have regard to case law in reaching my decision.

24 MS O'DOHERTY: Of course not, Judge, I'm not. But I am also saying that these
25 are very special circumstances --

26 JUDGE: All right.

27 MS O'DOHERTY: -- in which we may need to make some new case law because it
28 is such a scenario. It's such an unusual and exceptional scenario where our country
29 is being broken once again but in a way it has never been broken before. But this
30 caretaker arrangement, and I am going to stick to using that term because it's an
31 ironic term.

32 JUDGE: By all means stick to it, I don't mind you can stick to the term caretaker,
33 but you also have to have regard to what the Constitution says about it which is that
34 the ministers continue in office to carry out their duties.

1 MS O'DOHERTY: I think the men who wrote this Constitution did not for one
2 second envisage that an unelected government with at least three members who have
3 been utterly rejected by their constituencies. A Ceann Comhairle who was in a state
4 of public contempt in the weeks running up to these outrageous decisions.

5 JUDGE: Just a second, Ms O'Doherty, by all means you may of course challenge the
6 decisions made by the Ceann Comhairle, but I will not allow you attack the
7 reputation of the Ceann Comhairle in the manner you just have.

8 MS O'DOHERTY: Well no, I wasn't attacking it.

9 JUDGE: Good.

10 MS O'DOHERTY: I was just stating facts.

11 JUDGE: Well I'm glad you understand that.

12 MS O'DOHERTY: Oh no, no, I was stating the facts that he was the subject of much
13 public contempt and disrespect, I suspect, in the weeks before he made these
14 outrageous decisions because of his handling of a case.

15 JUDGE: Ms O'Doherty, I am not going to --

16 MS O'DOHERTY: And he was on the brink of having to hand in his resignation.

17 JUDGE: Ms O'Doherty, you are if you don't mind me saying so, abusing the
18 position of the court by carrying on like that. You have made a case against --

19 MS O'DOHERTY: I am saying that the authors --

20 JUDGE: Excuse me, listen to me please, you have made a case against a Ceann
21 Comhairle concerning the decisions which he has taken. In no part of any of your
22 submissions or your lengthy statement of grounds had you in any way impugned the
23 integrity of the Ceann Comhairle and you are not going to do so now.

24 MS O'DOHERTY: Sorry, Judge, if you are aware of what was happening in the
25 weeks before this legislation happened --

26 JUDGE: I'm not going to repeat myself on this point.

27 MS O'DOHERTY: That's all right.

28 JUDGE: Good. Thank you very much. Now would you please carry on.

29 MS O'DOHERTY: I'm making the point, Judge, that I don't believe --

30 JUDGE: You have made the point and I have made it expressly clear that you are
31 now currently abusing the court process and I will not allow it happen.

32 MS O'DOHERTY: I am going to continue.

33 JUDGE: Thank you.

34 MS O'DOHERTY: I don't believe the authors of the Constitution --

1 JUDGE: Yes.

2 MS O'DOHERTY: -- would have wanted a scenario which I am trying to outline, if
3 you will let me, whereby we have all of the ministers so-called unelected, they don't
4 have seats in the Dáil yet they are sitting in ministerial offices. There was no vote
5 carried out. I believe it doesn't -- this legislation didn't reach stage 5, if I am right.
6 It's certainly the case that every single member of the Dáil should have been there
7 given the very serious circumstances that were at play. It goes without saying,
8 whatever the standing orders, whatever the case law, this was an incredible request
9 of the people who are there to represent the public. We want you to keep your
10 people literally in their homes. This is going --

11 JUDGE: I think you said that and Mr Waters in his submission made that point too.

12 MS O'DOHERTY: And also it is the case that huge expenditure is happening at the
13 hands of this unelected government, Judge, as well at the moment. Even Enda
14 Kenny, when he was faced with this situation in 2016, I believe it was, where I think
15 there were two members of that particular government who did not have Dáil seats,
16 he I believe alluded to the fact, you'll maybe correct me on this, that he was not
17 going to make any serious decisions or anything that would affect let's say, I'm not
18 quoting him.

19 JUDGE: No.

20 MS O'DOHERTY: But I presume he meant the rights of people. I have not heard
21 anywhere in this legislation or any politician representing the government talking
22 about the rights of the Irish people and how they are going to be affected and we
23 must protect them.

24 JUDGE: Yes.

25 MS O'DOHERTY: So that's why we are here, Judge.

26 JUDGE: Yes, I understand.

27 MS O'DOHERTY: That's why we are calling on your to be the last arbiter at this
28 stage, the only arbiter, the only person who will stand up and say no, enough is
29 enough. To me this sounds like a coup. What is being described it sounds like a
30 coup and we do believe that the Seanad was outgoing. I know that even Éamon Ó
31 Cuív whose grandfather was obviously very much involved in this Constitution, he
32 was drawing attention to the fact that there was serious questions to be asked about
33 the fact that the Seanad was the outgoing Seanad. So we can stick to all of the rules
34 and regulations, but there is a broader public interest that --

1 JUDGE: Do you say that this broader public interest overrides the various articles in
2 the Constitution?

3 MS O'DOHERTY: Well I certainly do, of course I do.

4 JUDGE: I see.

5 MS O'DOHERTY: But not in the Constitution.

6 JUDGE: Okay.

7 MS O'DOHERTY: No, no, no, but I believe that there are many articles of the
8 Constitution that are being abused as a result of that.

9 JUDGE: All right.

10 MS O'DOHERTY: And I think these points while they are obviously very valid, we
11 have a situation now where this caretaker arrangement can go on indefinitely. Judge,
12 there is no end. When is this going to end? When are they going to go back to the
13 people? Are they going to go back to the people?

14 JUDGE: Again, I appreciate -- I think you are probably now speaking as a
15 spokesperson of your Anticorruption Ireland political party and, you know, they may
16 well be interesting political points. But I'm really concerned with legal submissions
17 and I'd really wish you'd confine yourself to that.

18 MS O'DOHERTY: Well, I'm making the point, I can't quote the case law in this but
19 I'm making the point that everything that has just been said by counsel for the
20 Oireachtas and Ceann Comhairle is said in the context of a scenario whereby this
21 little arrangement that they have going on, caretaker arrangement whereby they have
22 managed to effectively introduce military law. I mean marshal law, the detention of
23 people in their homes. When is it going to end? And if you don't end it, Judge, who
24 will?

25 JUDGE: Yes. Well thank you very much, Ms O'Doherty. Does Mr Waters wish to
26 say anything?

27 MR WATERS: Yes, thanks, Judge. Just a few points. On the question of the
28 plenary summons route and the option that was there, can I just say order 84 rule 20.

29 JUDGE: Yes, sorry, order 84, rule?

30 MR WATERS: Yes, no application for judicial review shall be made unless the
31 leave of the court had been obtained in accordance with this rule, so that's what we
32 are seeking. As such, the applicants submit that a judicial review challenging the
33 Constitution statute falls within the ambit of rule 20 (1) and the direct issue of a
34 plenary summons by the applicants without prior express direction of the Court will

1 amount to an infringement of the intent of this rule and in order 84 rule 20 (1)
2 expressly enables the Court when considering applications for leave to bring judicial
3 review proceedings to direct that the application proceeds by way of plenary
4 summons rather than notice of motion. So we were conscious and cognizant fully of
5 this particular situation and in a sense because we were very anxious to do several
6 things in making the application, obviously to express our own particular positions as
7 applicable persons notwithstanding... states, I think that was a rather pedantic point
8 about the fact that it doesn't appear in the parent legislation or in the secondary
9 legislation but only in the regulations. I mean the regulations are the front line effect
10 of all of this on the public on the streets and byways of Ireland. The secondary thing,
11 I mean, so we were actually mindful that we also wanted to be making a public
12 interest case. Again yesterday I mentioned the Crotty v. Taoiseach case in which
13 he was permitted --

14 JUDGE: Mr Waters, are you saying in effect, look, we considered going the plenary
15 route, but we decided not to and proceed down the judicial review route?

16 MR WATERS: Well, I would put it rather differently, Judge.

17 JUDGE: Yes.

18 MR WATERS: I would say that we considered all our options.

19 JUDGE: Right.

20 MR WATERS: I would say we always had a leaning towards judicial review. We
21 did investigate the question of plenary summons and it was advised to us at one point
22 in the court by Judge Murphy, I think, that in her view would have been the correct
23 route. We didn't agree. We examined it again, we didn't agree and we still, we hold
24 to our position.

25 JUDGE: Okay.

26 MR WATERS: The nature of this issue, again it's a way of also emphasising the
27 sheer gravity and public nature of this situation that is so exceptional that we felt to,
28 as it were, and I don't mean this in any kind of disparaging way, to reduce it to a
29 personal quarrel with the state alone, from that perspective alone would have been to
30 diminish the significance and worth of the question at stake. There's another brief
31 point that in *Nowas v. the Minister for Justice, Equality and Law Reform*, Clarke J in
32 the Supreme Court reiterated there is no rigid rule on the procedure formality and
33 requiring the constitutional challenge being made by plenary summons rather than by
34 order 84 judicial review application. He stated, "However, it is important to

1 emphasise there is a difference between judicial review proceedings for which leave
2 has been granted being brought by direction of the Court by plenary summons on the
3 one hand and a party simply issuing a plenary summons in the ordinary way without
4 any leave on the other hand. It may be that an appropriate case, proceedings having
5 been so commenced the Court may direct that once leave is given the substantive
6 application for judicial review should proceed by plenary summons." We are fully
7 cognizant of all of that, Judge.

8 JUDGE: All right.

9 MR WATERS: But we have made this decision in the light of all of that information
10 and again for the reasons I've stated.

11 JUDGE: All right.

12 MR WATERS: I just wanted to briefly touch on a few more points. I think the
13 question of personal standing has been pretty much dealt with, but again I would say,
14 you know, that we are a bit unclear really as to how we can talk about a situation
15 which is impinging on the consciousness and the lives of every single citizen, and
16 that you actually, and I accept that the Court and so on, that you have to spell it out
17 in minute intimate detail that you are affected by it. I question that. It is not as
18 though the circumstances are unknown to the Court or could be unknown to the
19 Court and so therefore in a certain sense much more an in the Crotty case, it's quite
20 obvious we are citizen, we are affected, we are applicable persons.

21
22 Again, we have suffered, we have to show we have suffered a change in
23 circumstances. Everybody has suffered changes in circumstances, startling,
24 extraordinary changes in circumstances, Judge, we have as well like others. Again,
25 just the concept of sufficient interest and so on. Counsel mentioned a concept of the
26 landlord and tenants. In fact until very recently I was renting my house, so I'm
27 registered with the residential tenancy board and so on. I didn't feel it necessary to
28 add, to guild the lily of my applicability as a person, if you like, but that is the case
29 and there are other categories as well that we didn't feel necessary to pile on to our
30 affidavits in the last few days. But I think, you know, it's really beyond question, I
31 believe, of course it's a matter for you, Judge, but I think this is a needless
32 controversy of a triviality.

33

34 Again, there's scientific evidence. Again just to restate, I know you know this point

1 as well but we made this application ex parte in the belief that it would be given a
2 very brief hearing, yes or no, and we could take it from there. Now we are
3 embroiled in this process which is really, I have been involved in full trials of
4 various kinds of cases and we are in the midst of one such now for certain, even
5 though it is purely a leave application. The question of the Mental Health Act and
6 the point again raised, you know, what, does one have to be mentally ill to take up
7 the question or to put oneself at the risk indeed of being arrested and taken into
8 custody if one admitted it in the Court that one was mentally ill in order to qualify in
9 terms of an applicable person. It would be a very risky thing to do in the present
10 circumstances, Judge, I think and I think we will actually whatever the risk from a
11 legal point of view we will actually pass on the invitation to do so.

12

13 In relation to the responses from the notice parties, again, I would raise the question
14 of the document I passed to my friend from the library and research section of the
15 Oireachtas. I really, I accept the point he makes but I would ask this question, what
16 is the Oireachtas doing, presenting the public with false information if indeed it is
17 false? That this is the place where the ordinary citizen goes to find out what exactly
18 is the situation that pertains to the legalities of these crucial matters that effects the
19 fundamental rights of citizens and they are given information which my friend tells
20 me is false.

21 JUDGE: I don't think he says it is false. He said that it doesn't really purport to be a
22 legal interpretation of the relevant constitutional provisions.

23 MR WATERS: I beg your pardon, Judge, but what can be the difference? What can
24 be the difference between a legal interpretation and a human interpretation by a
25 citizen?

26 JUDGE: Just to complete the point, Mr Kieran also drew our attention to the proviso
27 at the bottom that nothing herein constitutes professional advice of think kind. I
28 mean that's what it is, isn't it.

29 MR WATERS: Unfortunately, and I won't labour the point, but a citizen including
30 myself seeking in good faith information about these things would go to that website
31 and seeing that in the same was as reading a novel.

32 JUDGE: Maybe you can take it up with the house us of the Oireachtas and ask them
33 to amend it.

34 MR WATERS: Well, when the present crisis, when it ends, if it ever does, we will

1 certainly do that, Judge.

2 JUDGE: All right.

3 MR WATERS: But I don't see those disclaimers have any more basis than the
4 assertion on the inside cover of a novel that characters in this book bear no
5 resemblance to any living person. I think anybody who knows anything about
6 novels would certainly be aware that that's a falsity. So, the entirety, the entirety of
7 the understandings of the people concerning their parliamentary situation are
8 extraordinarily confused as a result of this, must be extraordinarily confused and are
9 open to all kinds of misinformation and I think will have contributed to the
10 escalation of the situation we are now in, which is as Ms O'Doherty has described it.

11

12 Yes, again the question of caretaker Dáil phrase, I accept that doesn't have any
13 provenance in any particular, any more than it did caretaker government. What we
14 were referring to there was a situation where the government who is the primary
15 mover of legislation is in a sense the Dáil is hampered by the fact that this
16 government is a caretaker of administration and everything that happens is defined
17 by that. It is clearly not a government that can initiate or ought to initiate a new
18 wave of legislation for the betterment of Ireland.

19 JUDGE: I know we have discussed it, Mr Waters, but the Constitution does
20 expressly say that the ministers continue to carry out their duties notwithstanding
21 the fact that they may even in the cases of a number of them that they are no longer
22 members of the Dáil.

23 MR WATERS: Yes, it says that they should not be members of the cabinet if they
24 are no longer members of the Dáil or the Seanad and they are and that's a question
25 that we have been trying to resolve here between us.

26 JUDGE: Of course they are actually resigned. Isn't the process that the minister is
27 resigned by continues, so they have actually resigned.

28 MR WATERS: And still functions as a minister doing crucial things.

29 JUDGE: Yes.

30 MR WATERS: Doing things that have enormous import for this society into the
31 future. Perhaps part of the destruction of the society for the next 20 years. These are
32 very momentous matters, Judge.

33 JUDGE: I appreciate that.

34 MR WATERS: This is why we are here and we would not be here otherwise.

1 JUDGE: I know that, but look, maybe if we could just steer clear of the oratory now
2 at this late stage and just concentrate on the state.

3 MR WATERS: Well I don't regard it oratory, Judge.

4 JUDGE: All right.

5 MR WATERS: I think it relates to the human element of this matter which is
6 intense.

7 JUDGE: Okay.

8 MR WATERS: And enormous. My friend here referred to, in this context, justice
9 Gerard Hogan in his book he said, I think it was a book that he referred to that
10 governments should exercise prudence. He said that was a political point, not a legal
11 one. Well I think Mr --

12 JUDGE: As a caretaker government?

13 MR WATERS: No, this is in relation to the idea that I think caretaker governments
14 should exercise prudence in the terms of their operation as governments and that
15 implies, I think, in some way that they are not actually in the view of Mr Justice
16 Hogan exactly like a normative government elected and given the new seals of office
17 and so on.

18 JUDGE: Yes.

19 MR WATERS: I think that's a very important point and it's not a political point at all
20 because I believe Mr Justice Hogan is not a politician, he's a judge and that's a very
21 important issue that I think we should remember. Now, as regards finally the
22 question of the Cherry case. I just want to restate and emphasise that I'm not of
23 course, I think there was a lot of misdirection there almost in relation to the
24 proroguing of parliament. That is not the issue I was raising at all. I hope you
25 understood the point I was making, Judge, which is that this is an instance where a
26 court, several courts in a crucial issue, in this a very analogous situation in enjoining
27 this jurisdiction which has been an enormous influence or ours through the centuries,
28 contrary to the constant assertion, and indeed you suggested this to me and to
29 counsel for both sets of parties, that the courts have no purpose, no role in interfering
30 in the matters of parliaments of the Oireachtas. My point was, purely is, that this
31 case, the Cherry case and the other case showed clearly that this is not so. That when
32 the matter was regarded as brave enough in democratic terms or in legal terms, the
33 Courts will intervene. In other words, I think that the cases that have been cited are
34 such purely because a certain bar has not been reached in all of this in this

1 jurisdiction where the courts have felt moved to, as it were, intrude upon the
2 jurisdiction of the Oireachtas, but that these cases show that such a bar does exist and
3 that it can be reached and proceeded in certain circumstances which are
4 extraordinary, I have no doubt. But I put it to the Court that if ever we were in
5 extraordinary circumstances we are in them now, these last two months.
6 Extraordinary, the most extraordinary ever. I think never envisaged by the framers
7 of our own Constitution which day by day shows itself to be completely, it seems,
8 outmoded or outstripped by the culture shifts that have happened in politics and the
9 way in which political parties behave, I have to say cynically in the face of rules
10 which they have discovered do not put excessive pressure on them to behave in an
11 ethical and proper and democratic matter. I will say therefore that we have to at
12 some point I think in the reckoning that will follow all of these events, look at these
13 points also. Thank you.

14 JUDGE: Yes, thank you, Mr Waters. Now, obviously I'm not going to give my
15 ruling now. This matter has gone on for a day, day and a half or so and a number of
16 very important issues have been raised which I obviously want to consider. But in
17 terms of delivering my judgment I propose to adopt what is now the current practice,
18 and that is that my judgment will be delivered electronically to the parties and then
19 the parties will have an opportunity to make what submissions they may wish to
20 make arising out of my judgment. So that's the way I propose to proceed.

21 MR WATERS: Sorry, Judge, can I ask you a question about that?

22 JUDGE: Yes.

23 MR WATERS: Does that imply that the right of imply could have an effect on your
24 willingness to overrule yourself, as it were, or not?

25 JUDGE: I don't understand that, maybe I didn't make myself clear. I will be giving
26 my judgment in the matter and arising out of that judgment it may well be that
27 certain orders have to be made.

28 MR WATERS: Oh I see.

29 JUDGE: As the judgment is going to be delivered electronically, it will mean that
30 both parties will be afforded an opportunity as to what are the consequential orders
31 from the judgment I give.

32 MR WATERS: I understand, Judge, I beg your pardon, I didn't understand.

33 JUDGE: Not at all, I'm sorry, I probably didn't make myself clear.

34 MR WATERS: Thank you very much.

1 JUDGE: Okay.

2 MS O'DOHERTY: Judge, can I ask one question.

3 JUDGE: Yes.

4 MS O'DOHERTY: Do we need to give extra affidavits in relation to our locus?

5 JUDGE: No, the hearing is now concluded.

6 MS O'DOHERTY: Could I ask that you expedite this matter for all of the reasons
7 John and I have outlined.

8 JUDGE: All the parties may rest assured that I am going to give this matter
9 complete priority.

10 MR WATERS: Thank you very much, Judge.

11

12 Court concluded (3.34 pm)

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