THE COURTOF APPEAL

CIVIL

UNAPPROVED **NO REDACTION NEEDED**

[2020 No. 147]

Birmingham P.

Edwards J.

Costello J.

BETWEEN

GEMMA O'DOHERTY & JOHN WATERS

APPELLANTS

AND

THE MINISTER FOR HEALTH AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

DÁIL ÉIREANN, SEANAD EIREANN AND AN CEANN COMHAIRLE

NOTICE PARTIES

JUDGMENT of Birmingham P. delivered on the 3rd day of March 2021

1. This is an appeal from a decision of the High Court of 13th May 2020, refusing the applicants leave to seek judicial review. The relief sought was as follows:

> An order of *certiorari* declaring the enactment of a number of measures null and void, specifically:
>
> (i) the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020;
>
> (ii) the Emergency Measures in the Public Interest (Covid-19) Act 2020; and

(iii) the Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) Regulations 2020.

2. Before addressing the merits or demerits of the appeal, there are a number of procedural issues that merit mention.

The Fact that the Application in the High Court was on Notice

3. On 15th April 2020, the applicants made an *ex parte* application to Sanfey J. who directed, pursuant to O. 84, r. 24 of the Rules of the Superior Courts, that the application should be made on notice to the respondents. After a number of listings, in the nature of case management listings, the application for leave, by then on notice, came on for hearing before Meenan J. in early May 2020.

The High Court Refused the Application for Leave on a Number of Grounds

4. Meenan J., after hearing the application for leave, concluded as follows:

(a) The applicants had not demonstrated a sufficient interest or *locus standi* to challenge the measures insofar as they amended the Residential Tenancies Act 2004, and the Mental Health Act 2001.

(b) The applicants did have standing to challenge the other measures introduced, but, applying the principles outlined in *G v. DPP* [1994] 1 IR 374, they had not demonstrated an arguable case that the measures were unconstitutional. Moreover, the applicants had not made out an arguable case that the measures were 'directly repugnant' to the European Convention on Human Rights and/or the Charter of Fundamental Rights and/or EU law, where these instruments do not have direct effect in respect of these measures.

So far as the applicants' claims in respect of the notice parties were concerned, these claims were, in the view of the High Court, unstateable.

5. At various stages, the applicants have indicated their disapproval of the fact that their application for leave was heard on notice and was not considered on an *ex parte* basis. However, O. 84, r. 24 of the Rules of the Superior Courts very clearly makes provision for a judge to require that an applicant put the respondent on notice in applications for leave. For my part, I can certainly see how any High Court judge would take the view that the nature of the challenge and the nature of the reliefs sought was so far-reaching that it was appropriate to put the respondents on notice. It must be appreciated, as specifically adverted to by the High Court judge, that the fact that the applicants were required to put the respondents on notice did not alter the threshold that the applicants were required to meet. The proceedings in the High Court, and indeed before this Court, were on the basis that the threshold was that referred to in *G v. DPP* [1994] 1 IR 374, which, as has often been said, is a low threshold. However, while the requirement to establish an arguable case is a low threshold, it is not a non-existent threshold.

6. The question of what amounts to arguable grounds was addressed by Charleton J. in the course of his judgment in *O.O. (an infant) v. Minister for Justice and Law Reform* [2015] IESC 26, a case involving the refusal of leave to seek judicial review of the Minister's decision not to revoke a deportation order. In the course of his judgment, he commented as follows:

> "Any issue in law can be argued: but that is not the test. A point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success. It is required for an applicant for leave to commence judicial review proceedings to demonstrate that an argument can be made which indicates that the argument is not empty. There

would be no filtering process were mere arguability to be the test without, at the same time, taking into account that trivial or unstatable cases are to be excluded: the standard of the legal point must be such that, in the absence of argument to the contrary, the thrust of the argument indicates that reasonable prospects of success have been demonstrated."

It seems to me that the observations of Charleton J. are very much in point in the present case. Of course, at one level, everything is arguable; it is, in one sense, arguable that the earth is flat, but it seems to me that to meet the arguability threshold of *G*, the argument must, as a minimum, be based on reason and common sense, and not such that it can be fairly and non-controversially be categorised as absurd and nonsensical.

7. I will return to these observations at a later stage in the course of this judgment.

The Procedure Followed

8. In the High Court, there was an issue as to whether the applicants had followed the correct procedure, or whether they had adopted an incorrect procedure in bringing their proceedings to have legislation declared unconstitutional by way of an application for judicial review. The respondents urged on the Court that the correct approach would have been to bring the applications by way of plenary proceedings and the judge accepted those submissions as being correct. However, that was not the end of the matter, as he took the view that had he reached the conclusion that the applicants had established an arguable case, that the correct course of action for him to take in those circumstances would be to order the proceedings to continue as if they had been begun by plenary summons.

9. For my part, I am of the view that the High Court judge was clearly correct in that regard, but insofar as he went on to address the substance of the issues raised and the merits or lack of merits of the challenge, there is little more that needs to be said on this topic at this

stage. I would, though, simply observe in passing that had the applicants taken on board what was said to them, not once but on a number of occasions, about the inappropriateness of proceeding by way of judicial review and the desirability of proceeding by way of plenary proceedings, that they would have avoided the filtering process, at which stage, they in fact stumbled.

The Administration of Justice in Public

10. The proceedings were listed in the High Court before Murphy J. and Meenan J. These listings were essentially in the nature of case management listings, involving laying out a timetable for the delivery of affidavits, legal submissions and the like. On occasions, the applicants contended that because of limited public access, what was occurring was contrary to the provisions of Article 34.1 of the Constitution and did not amount to the administration of justice in public. This issue then emerged as a substantial topic in the course of the hearing in the High Court. The appeal hearing before this Court was what has come to be referred to as a 'hybrid appeal', that is to say, with certain parties participating from the physical courtroom, and others participating remotely on the Pexip app. In that context, I should point out that since we started these remote hearings, our proceedings have been reported in the media on a very regular, almost daily, basis. Journalists have had the option of attending in the physical courtroom and reporting from there, or following the proceedings from a 'virtual meeting room' ('VMR') or a virtual courtroom. Members of the public also observe our proceedings from time to time. Because of limitations on numbers arising from the requirement to permit social distancing, the number of members of the public that can be admitted to the courtroom is very limited and it is probably the case that most members of the public who have attended physical hearings were friends or supporters of one of the parties in the case, as distinct from casual observers. Those requesting admission to the virtual

courtroom have likewise, for the most part, been interested members of the public in the sense described, but we have also had requests from people anxious to see how the process works, from individuals involved in work experience and so on. I am personally not aware of any request for access to a virtual courtroom being refused.

11. The High Court judge dealt with the hearing in public issue in these terms:

> "Amongst measures introduced to prevent the spread of Covid-19 was *'social distancing'.* In a court setting, social distancing means that it is no longer possible to have as many members of the public physically present in court as used to be the case. It was always the case that for the hearing of certain actions, not every member of the public who wished to attend in court could do so. There is an obvious physical restraint, being the size of the courtroom. With social distancing, the facilitating of members of the public who wish to attend in court has been reduced. However, it does not follow that because every member of the public who wishes to attend cannot do so, that the hearing is not being held in public. In this case, members of the media who wished to attend to report on the proceedings were facilitated. Most members of the general public acquire their knowledge of court cases through the media. In addition, Murphy J. directed that the applicants be furnished with a copy of the transcript of the hearings without the usual charge, I continued this order for the hearings before me. I am satisfied, notwithstanding the physical limitations imposed by social distancing on the numbers of the public who could attend in court, that these hearings were heard in accordance with Article 34.1 of the Constitution."

12. The applicants are critical of the High Court judge for equating the ability to be informed about court proceedings with the requirement that the court proceedings should take place in public. The applicants are dismissive of the suggestion that the public's right to attend court proceedings, entering through an open door for that purpose, are satisfied by the

fact that members of the media are present, reporting. The applicants refer to the media as "mainstream HSE-funded media" and it is said that they, along with doctors and hospitals, "have a perverse monetary incentive to promote the Coronavirus narrative, terrorising a nation already on edge with their daily agenda of fear and deceit".

13. The applicants also contend that the provisions of Article 34.1 of the Constitution are not met by provisions for virtual or remote hearings, as these are rendered possible by electronic means which are, by their nature, exclusive of certain categories of citizens, *e.g.* some elderly people, people of limited means and people who object to the virtualisation of public processes on a philosophical basis.

14. The reality is that most people never give any consideration to attending to observe a court sitting. They may have little interest in doing so, and even if they would like to, there may be practical impediments. They may have to work or study on a day that a case of interest is listed. The case may be heard at a venue far from their home; they may not have transport and one could go on and on. There have been a number of cases which aroused interest on the part of the public, or a significant section thereof, where it was not possible for everybody who wished to attend to be accommodated. There have always been, and in all likelihood will always be, some limitation by reason of space, though it must be said that modern technology has the potential to expand and improve the opportunities for individuals to observe court proceedings.

15. As a court President, I can say that from the outset, all court Presidents have been acutely conscious of the imperative to have justice administered in public. I am not aware of anyone being refused entry to either a physical court or a virtual court, though I think there have been a small number of occasions when individuals have been invited to leave the courtroom so as to allow somebody else to enter whose presence was essential for the

conduct of the business while adhering to the maximum number that can be accommodated in a courtroom if social distancing is to be maintained.

16. The applicants argue that the presence of members of the public in court serves, as they put it, "to keep the media relatively honest". They say this happens if there is a possibility of a witness to proceedings coming forward to contradict the version which is given by the media of the proceedings. However, that argument ignores the fact that the media is not homogenous. There are multiple media outlets, but perhaps from the applicants' perspective, given their comments about "HSE-funded media", more significantly, there are many individuals who are active in the media on a freelance basis. There is no suggestion that any *bona fide* member of the media was denied access to observe and report. I am not aware of any suggestion that media figures have been denied access, whether to a physical or remote courtroom, so as to prevent them observing and reporting.

17. The applicants have asserted that the trial judge directed that no member of the public would be permitted access to the court hearing, but I am not sure what the basis is for this assertion. It does not appear that there was any application to the judge that a particular person be admitted, nor was there an application, as far as I am aware, to increase the numbers permitted to be in court. There was no request for anyone in court to leave to accommodate others, though, as I have indicated, such a changing of the guard is not unheard of.

18. There have always been limitations by reason of space, and restrictions by reason of health and safety concerns, the need for fire certificates and so on. Public health considerations may also arise from time to time. My impression, based on media reports at the time, was that a very large gathering assembled. A gathering of that size could not be accommodated in present circumstances, and indeed, in truth, probably could not be accommodated under any circumstances. In all the circumstances, faced with the situation

that the High Court judge was, I am quite satisfied that the appellants' criticism of the procedure followed in that court is ill-founded.

The Approach of the High Court Judge

19. As previously referred to in the course of this judgment, the High Court judge took the view that the applicants lacked *locus standi* when seeking to challenge amendments to the Mental Health Act 2001 and the Residential Tenancies Act 2004. In a situation where there was no suggestion whatsoever that either applicant was among the category of persons for whom provision was made at Part V of the Emergency Measures in the Public Interest (Covid-19) Act 2020, which deals with amendments to the Mental Health Act, either as mental patient, psychiatrist, tribunal member or otherwise, and in the case of the Residential Tenancies Act, no indication that either applicant was either a landlord or a tenant, or certainly not a landlord or tenant whose situation was affected by the amending legislation, then, in my view, he was manifestly correct to reach the conclusion that he did in that regard.

20. After an introductory section of the judgment, which referred to the nature of the proceedings and to the measures that are the subject of challenge, the judge pointed out that the applicants' case against the respondents related to the constitutionality of the legislation and the regulations he had identified, whereas their case against the notice parties concerned the legislative process. The judge indicated that he would deal separately with each of these matters and then proceeded to do so. It is, perhaps, indicative of the manner in which the applicants have approached this case that even the judge's introductory remarks have been the subject of criticism. At para. 5 of his judgment, the judge recited that the first named respondent (the Minister for Health) had taken a number of measures to halt the spread of Covid-19 and to address the economic and social effects of the virus. The applicants protest that in asserting that the first named respondent took a number of measures to halt the spread

of Covid-19, Meenan J. prejudged the matter at hand by implying that these measures had been effective, when this assertion was unproven and contentious. With respect to the applicants, the judge did not say anything about whether the steps taken were effective or not. There may be room for differing views as to whether the measures taken were the appropriate ones; whether they were timely and whether they were proportionate. I suspect there would be a wide range of views within Irish society and beyond on those issues. I suspect there would be people, amongst them, the appellants, who would believe that that decisions were unjustified and overly-severe, but I suspect there would also be others who would argue, and would believe strongly, that the government's response was not strong enough. It was a curious feature of the case that while the applicants contend that it is now well-proven that the virus was no more serious than a seasonal flu, on other occasions, they, or certainly the first named applicant, appeared to be critical of the government for failing to close the airports and ports, and on other occasions, for failing to follow a so-called herd immunity strategy. It does give the impression that the applicants' position is that they disagree with the government's approach; that they know better than government and that they look to advance their views through the courts. In that regard, observations of O'Donnell J. in *Mohan v. Ireland* [2019] IESC 18, a case involving the question of whether a political activist and aspiring candidate had *locus standi* to challenge the constitutionality of gender quota targets, are of note. O'Donnell J commented:

> "The step of permitting a challenge to the constitutional validity of a piece of legislation should not, therefore, be taken lightly, simply because someone wishes, however genuinely, to have the question determined, but rather should only be taken when a person can show that they are adversely affected in reality. Courts do not exist to operate as a committee of wise citizens providing a generalised review of the validity of legislation as it is enacted, nor should courts

become a forum for those who have simply lost the political argument in the legislature to seek a replay of the argument in the courts, repackaged in constitutional terms."

21. Apart from the specific grounds of challenge, where the judge felt that the applicants lacked *locus standi*, to which there has been reference, in relation to the balance of the challenge, the judge felt that the applicants did have standing to mount the challenges. Again, I find myself in agreement with his approach. Before looking at how he dealt with the substantive challenge to the various measures, there is one discrete issue that it appears proper to deal with first, this being the arguments advanced by the applicants by reference to Article 28.3 of the Constitution. Article 28.3.3° provides:

> "Nothing in this Constitution other than Article 15.5.2° [no imposition of the death penalty] shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law."

22. The applicants say that whatever else might be said about the measures introduced by the government, they were not expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion.

23. The respondents say, and they are undoubtedly correct in this regard, that the government made no reference to Article 28.3 of the Constitution and that none of the legislation passed was expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion. The contrast with the long title of the Emergency Powers Act 1976 is a striking one. The long title of that Act was:

"An Act for the purpose of securing the public safety and the preservation of the State in time of an armed conflict in respect of which each of the Houses of the Oireachtas has adopted a resolution on the first day of September, 1976, pursuant to subsection 3° of section 3 of Article 28 of the Constitution."

24. However, that is not the end of the matter. The appellants complain that there has been an attempt to mislead the public by means of the text of the preambles to the challenged legislation, and in particular, has, by the repeated use of the term 'emergency', led the public into believing that a state of emergency exists. With respect to the applicants, the suggestion of people being confused is without foundation. It is an argument to be made, if it is to be made anywhere, in the political arena. If any proof is required that this is not the emergency legislation dealt with in Article 28.3.3°, it is provided by the very fact of these proceedings, which correctly proceed on the basis that Article 28.3.3° provides no support or comfort to the State respondents, and that the legislation is subject to challenge by reference to established constitutional principles and must stand or fall by reference to those principles. I am bound to say that I see the debate about Article 28.3.3° as being something of a red herring. Emergencies may, of course, arise in the context of war or armed rebellion, but emergencies may arise in other contexts, too. We may have, for example, and indeed have had, financial emergencies. One could imagine emergencies caused by adverse weather conditions, or by natural disasters. However, the protection for legislation provided for by Article 28.3.3° applies only in respect of legislation expressed to be for the purpose of securing public safety and the preservation of the State in times of war or armed rebellion.

25. Dealing with the substantive challenge to the constitutionality of the various measures, the judge indicated that he was of the view that no case had been made out that s. 31A or any amendment to the Health Act 1947 was inconsistent with Article 41 of the Constitution, the article concerning the family. He referred to the contention on behalf of the

applicants that restrictions on movement and assembly were destructive of family life. He acknowledged, correctly, in my view, that there was no doubt but that these restrictions do interfere with normal family life, but he was of the view that this was not a breach of Article 41. He said that the rights of free movement and assembly had to be considered in the context of the relevant articles of the Constitution that provide for this. The judge commented, once more correctly, in my view, that the applicants were not entitled to rely upon Article 45 which sets out principles of social policy. Those principles are not "cognisable by any court under any of the provisions of this Constitution", as stated by the Article. The judge pointed out that the various rights in the Constitution are not absolute and acknowledged that while as much is accepted by the applicants, they maintain that the restrictions and limitation of rights that are provided for in s. 31A and s. 38A are "disproportionate". He said that were the applicants to make an arguable case that the limitations of rights were disproportionate, it was necessary for them to put on affidavit some facts, which, if proven, could support such a view, but that there was a complete failure by the applicants to do this. He referred to and was implicitly critical of the fact that while the statement grounding the application for judicial review had been prepared on 16th March 2020, when there were some 268 cases of Covid-19 in the State, and the deaths of two people had been reported, the application for leave was made *ex parte* four weeks later, on 15th April 2020, without the narrative being updated, nor was there an update when a grounding affidavit was sworn on 5th May 2020. He pointed out that the Department of Health indicated that as of 5th/6th May 2020, there were 22,248 cases of persons having Covid-19, and 1,375 deaths had been recorded. No reference was made to this by the applicants.

26. It is the case, and I will refer to this in more detail, that the applicants are severely critical of official statistics, contending that the figures overstate dramatically the extent of the problem. They go so far as to use the word 'fraudulent'. Notwithstanding that, I regard

the decision to seek to move an application *ex parte* on the basis of greatly out of date, and therefore inaccurate statistics, as a serious matter. In my view, it is inconsistent with the requirement that those moving *ex parte* applications are required to act *uberrimae fidei*. In appropriate cases, it would justify the refusal of the application without proceeding to further consideration. However, in the present case, where updated figures are widely available to one and all, including judges, on a daily basis, it is neither necessary nor appropriate to adopt that approach. That the official statistics significantly or dramatically overstate the extent of the problem, to the extent of being fraudulent, is central to any case that the appellants would want to make. However, if the claim had any substance, it would seem to follow inexorably that the figures for infections and deaths in Ireland would, if greatly exaggerated, stand apart from the figures for other jurisdictions. If that was the situation, then, no doubt, the appellants would be very quick indeed to draw attention to them and to point out, if it were the situation, that Ireland stands apart as an outlier. The appellants have not pointed to any such statistics and I find the failure to do so to be very telling indeed.

27. The applicants are very critical of the approach of the High Court judge. It must be said that their submissions, both written and oral, are quite tendentious. They contend that what was at issue was an unprecedented experiment, purportedly carried out to protect the public from a virus, now well-proven to be no more serious than a seasonal flu. They claim that it is "now well-established that the respondents' actions have cost more lives than they saved", adding that there is "strong anecdotal evidence" of a significant increase in suicides and drug overdoses. They assert that this is not a national crisis. It is said that the judge failed to consider the evidence presented to him regarding the detrimental health, social and economic consequences of the Covid-19 legislation. They say that the question of whether the measures adopted were necessary, reasonable or justified was central to the application before the court, yet the judge carried out no "due diligence on them". They say that had he

done so, he would have established that the respondents' actions had no basis in science and had only caused catastrophic societal and economic harm. The notion that it is the function of a judge to carry out due diligence is a very surprising one, and certainly does not sit easily with the notion of a parliamentary democracy, where the sole and exclusive power to enact primary legislation is vested in the Oireachtas.

28. The applicants are aggrieved by the judge's criticisms of them for giving unsubstantiated opinions and speeches, engaging in empty rhetoric and seeking to draw a historic parallel with Nazi Germany. They say that they are experienced journalists in the fields of law, science and medicine, and that what they had contended for was fully supported by scientific studies, factual reports and medically-qualified persons. The judge is criticised for showing deference to a government whose actions are described as catastrophic, leading to the virtual abolition of the most fundamental rights and freedoms of the Irish people. By way of example, the applicants assert that "no scientific studies exist to support the wearing of face coverings to stop the spread of viruses, while voluminous scientific evidence concludes that facemasks are deleterious to human health and can cause oxygen deprivation, lung disease and cancer". At another stage, in the course of oral submissions, the applicant, Ms. O'Doherty, asserted without equivocation that there is a cure available for coronavirus in the form of hydroxychloroquine zinc and vitamin C, but that what some health services have been doing is placing patients in the intensive care unit, putting them on ventilators and actually bringing about their deaths. This, she claims, is well documented. To put it at its mildest, there is a tendency on the part of the applicants to present, as unchallenged fact, what is keenly in dispute. One is reminded of comments in another context of the existence of "alternate facts".

29. The respondents say that the approach of the trial judge was entirely correct. They say that it is the situation that the applicants failed to demonstrate an arguable case on the facts

referenced in their pleadings. The respondents go on to say that despite the unconventional way in which the proceedings are formulated (seeking *certiorari* of legislation), that in substance, what was being sought was a declaration of unconstitutionality. The respondents say that as a result, there is a burden on the applicants which arises from the presumption of constitutionality and the necessity for the applicants to show a rational basis upon which legislation could be set aside. The respondents say that the proceedings involve an invitation to the Court to second-guess the Oireachtas and to substitute its views in relation to matters and its views as to the wisdom of proceeding in a particular way for that of the Oireachtas. In that regard, the respondents draw attention to the Preamble to the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020, where it is said the Oireachtas's views on these issues are set out. It should be noted that the Preamble recites:

> "WHEREAS an emergency has arisen of such character that it is necessary for compelling reasons of public interest and for the common good that extraordinary measures should be taken to deal with the immediate, exceptional and manifest risk to human life and public health posed by the spread of the disease known as Covid-19; AND WHEREAS the State is and its citizens are, in significant respects, highly exposed to the effect of the spread of the disease known as Covid-19; and having regard to the constitutional duty of the State to respect and, as far as practicable, by its laws to defend and vindicate the rights of citizens to life and to bodily integrity, it is necessary to introduce a range of extraordinary measures and safeguards to prevent, minimise, limit or slow the risk of persons being infected with the disease known as Covid-19".

30. In substance, the State respondents contend that the proceedings are misconceived. The respondents say that the applicants misunderstand the obligation that rests on them in

seeking leave. Instead, the respondents say that the applicants have operated on the basis that there is some obligation on the State to justify, explain and defend the legislation. The respondents say that the case is, in substance if not in form, one where declarations of unconstitutionality are sought, and that, accordingly, the burden that the applicants bear is a significant one because of the presumption of constitutionality of legislation passed by the Oireachtas.

31. The respondents say that the applicants are showing scant regard for the doctrine of separation of powers, in that the courts are being asked to second-guess the response of the Oireachtas to what is widely seen as a worldwide health emergency. They say that the challenge is based on significant legal misunderstandings. For example, they point to the fact that the applicants say that the fact that the Minister makes regulations is contrary to Article 15.2.1° of the Constitution, which provides that the Oireachtas has the exclusive power to legislate, but they say the applicants ignore the fact that the entitlement of a Minister, when authorised by primary legislation to produce subordinate regulation is well established and has been the subject of a line of authorities.

Discussion

32. I should say, in clear and unequivocal terms, that I regard these proceedings as misconceived and as being entirely without merit. The arguments advanced might have a certain appeal if addressed to a flag-waving assembly outside the Customs House, but have no purchase when addressed to a Court of Law. I do not doubt that there are people who will disagree strongly with the approach taken by the executive and by the legislature. I acknowledge without equivocation that the decisions taken have been far-reaching ones that have impacted very significantly indeed on individuals and businesses. I do not doubt, as I have previously stated, that there are those who believe, just as the applicants do, that the

decisions have gone too far and are unnecessary and disproportionate, but there are others that believe that the government, in particular, is to be criticised for not going far enough, for not locking down quickly enough and for easing restrictions prematurely. However, the fact that different views may exist, and the fact that there is room for differences of opinion, does not provide a basis for an intervention by the courts. I do not exclude the possibility that it might be possible to formulate a serious challenge to one or other of the measures taken on some constitutional grounds, but what I am absolutely clear about is that the applicants have not done that. Both in this court and in the High Court, the applicants have made assertions in trenchant terms. I do not doubt that the views expressed are sincerely held, implausible, and indeed, eccentric, as many of them might appear to be, but the fact that individual citizens disagree with government policy and legislation enacted by the Oireachtas, does not provide a basis for a constitutional challenge. Bald assertions do not morph into anything more than that merely because the assertions are couched in strong, or indeed, extravagant language. One cannot lose sight of the fact that establishing that there is a rational basis for adopting a fundamentally different policy approach would not assist the applicants, even if they could achieve that; they must go much further than that and establish that the measures taken were impermissible and outside the range of responses available to the executive and the legislature.

33. For my part, I must make it clear that I am afraid that the arguments advanced by the applicants in the High Court, and before this court, involve arguments that might possibly have a place in the political arena, though that is far from saying that they would carry the day there, or would have significant support there, but they are quite out of place in a court of law.

34. The political, not to say polemical tone of the applicants' assertions, are evident, both from the supplemental affidavit presented by them on the eve of the appeal hearing in the

Court of Appeal, and by reference to their oral submissions. They begin by saying that the affidavit sets out certain facts which prove that the legislation was introduced on the basis that "the country was facing a grave health emergency was unwarranted, fraudulent and destructive to the Irish people, their health and the economy of Ireland". They continue:

> "It is now proven beyond all doubt that there is and was no pandemic in Ireland. At the very worst, Covid19 is a strong seasonal flu. Nothing justified the suspension of the Constitution for a disease with an estimated survival rate of 99.9% across all age groups. When we initiated this legal action last April, we stated this was the case and every claim we made then has been proven to be correct. Thousands of scientists, doctors and experts around the world have stated there is and never was any medical justification for lockdowns. The respondents have deliberately lied and concealed significant facts from the Irish people causing completely unsubstantiated fear in them while continuing to inflict their grotesque and illegal measures, destroying lives and health, our society and the Irish economy."

Thereafter, they deal with the failure to close the borders and say that the respondents' failure to do is blatant proof that their draconian laws are not in any way designed to curtail a contagious disease or protect public health, but rather, to purposely destroy the economy and to introduce a globalised surveillance police state, planned under UN Agenda 2030.

35. Continuing in a similar vein, the applicants observe that:

> "No scientist has ever endorsed nationwide lockdown until Xi Jinping authorised the lockdown of Wuhan and other cities on January 23, 2020. Given the Chinese Communist Party's tremendous grip over the respondents, it is patently obvious who is making the decisions. This is akin to treason on the part of the respondents".

The applicants say that lockdowns, mandated masks, contact tracing and vaccines are the key measures used by the respondents on the pretence that they will reduce the spread of the virus, yet they are all based on mere conjecture without any basis in fact.

36. The applicants go on to make various, highly contentious assertions which are presented as scientific fact. The affidavit refers to the respondents rolling out their untested and unsafe experimental vaccines which are said to be in breach of the Nuremburg Code, and there is then reference to the Gardaí engaged in flagrant and continuous brutal assaults on citizens who exercise their right not to wear a mask and to travel. It is asserted that the Gardaí have turned Ireland into a police State with aggressive checkpoints, causing traffic mayhem, enormous stress and an insidious invasion of the privacy rights of Irish citizens.

37. Notwithstanding the extravagance of the language, the applicants have failed to recognise that our constitutional architecture contemplates that it is for the executive to govern and for the legislature to enact legislation. The prerogatives of the executive and the legislature are not ousted by the fact that there are individuals who disagree with their actions.

38. The appellants are critical of the executive and legislature for listening to and acting on domestic and international advice. However, any suggestion that the government and legislature acted irrationally in doing so does not bear scrutiny. The affidavits sworn by Ms. Bernie Ryan, Principal Officer in the Department of Health, for the purpose of opposing the applicants' application for leave, makes clear that Ireland was guided in its response by the advice, guidance and protocols of the World Health Organisation (WHO) and the European Centre for Disease Prevention and Control. That advice was considered by the National Public Health Emergency Team who made recommendations which were submitted to Government for consideration and decision. Countries across the world have followed a broadly similar approach. In saying that the approach followed is broadly similar, I am not at

all ignoring the fact that in many countries, there has been vigorous, indeed, passionate debate, about the timing of the imposition of restrictions, how severe restrictions should be and when restrictions should be lifted. In some countries where decision making rests at state and/or local level, there have been vigorous debates, and divergences have arisen between regions and states. However, those debates must take place in the political arena. It is for elected leaders to make decisions and, where applicable, for legislatures, whether at a national, state or regional level, to legislate. It is not for unelected judges to usurp the role of government and legislatures when they are dealing with matters of great moment, but matters which are quintessentially political.

39. Subject to what I will say in relation to the aspect of the appeal involving the notice parties, I am firmly of the view that no remotely stateable basis for challenging the impugned provisions has been made out. Far-fetched assertions, no matter how extravagant the language, do not come anywhere close to meeting the *G v. DPP* threshold. The applicants' contentions clearly failed to meet the arguability threshold.

40. I turn now to the issues relating to the notice parties. Essentially, the applicants raise issues relating to the legislative history of the measures that they seek to impugn. For the most part, the issues that they seek to raise have their origin in the fact that a general election took place on 8th February 2020. The outcome was inconclusive, in the sense that no single party, or group of parties forming a block, won the 81 seats required to form a majority government. Reflecting the outcome of the general election, the first meeting of the 33rd Dáil, which was held on 20th February 2020, failed to elect a Taoiseach. Indeed, it was only on 27th June 2020, 140 days after the election, that a Taoiseach, Micháel Martin, was elected after three parties, Fianna Fáil, Fine Gael and the Green Party, agreed on a programme for government. The applicants draw attention to the fact that three members of the outgoing government, Ministers Ross, Zappone and Doherty, were not re-elected in the general

election. The applicants say that the three Ministers in question, at the time of the passage of the impugned legislation, were not members of Dáil Éireann or Seanad Éireann. They say that if a Minister has failed to be re-elected, he is therefore no longer a member of Dáil or Seanad Éireann and cannot be regarded as a member of the government. They appear prepared to acknowledge an apparent conflict with Article 28.11.2° which provides that:

> "The members of the Government in office at the date of a dissolution of Dáil Éireann shall continue to hold office until their successors shall have been appointed."

A further point raised relates to the fact that a number of members of the 25th Seanad were elected to the 33rd Dáil.

41. There are really two issues here. The first is whether there is any restriction on Dáil Éireann playing its role in the passage of legislation by reason of the fact that a Taoiseach and government was not elected until June 2020. The second relates to the role of the 25th Seanad. In my view, the constitution clearly envisages that there will be a period after a new Dáil has been elected, but before a new Seanad has been elected, during which the Seanad can continue to sit. Articles 18.8 and 18.9 provide that:

> "8 A general election for Seanad Éireann shall take place not later than ninety days after a dissolution of Dáil Éireann, and the first meeting of Seanad Éireann after the general election shall take place on a day to be fixed by the President on the advice of the Taoiseach.
>
> 9 Every member of Seanad Éireann shall, unless he previously dies, resigns, or becomes disqualified, continue to hold office until the day before the polling day of the general election for Seanad Éireann next held after his election or nomination."

In my view, Article 18.9 could not be clearer when it says that every member of Seanad Éireann shall "continue to hold office until the day before the polling day of the general

election". See, by way of example, comments at 4.4.06 in Kelly on *The Irish Constitution* (5th edn, Bloomsbury Professional, 2018). See, too, the comments of the Divisional Court in *Bacik & Ors. v. An Taoiseach* [2020] IEHC 313, where there was a reference at para. 139 as follows:

> "…up until 29th March 2020, the day before polling for the Seanad elections, both Houses were sitting and legislation could be and was passed.."

42. The statement of grounds had contended that legislation introduced by what the applicants described as a "caretaker government" is required to be passed by the newly-elected Houses of the Oireachtas.

43. The legislation in question was passed by both Houses, and that is the be-all and end-all of the matter.

44. There is a second limb to the applicants' challenge to the procedures followed in the Oireachtas. This relates to the fact that a bill, the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Bill, passed through a number of stages in Dáil Éireann on 19th March 2020, with a limited number of deputies in attendance. Some days earlier, the Ceann Comhairle had written to leaders of political parties proposing that 30% of deputies, being 48, should attend the sitting of the Dáil on Thursday 19th March 2020, with attendance calculated proportionately between various parties and groups. Remarkably, the statement of grounds quotes extensively from the Ceann Comhairle's remarks to Dáil Éireann on 19th March 2020. The applicants contend that the Ceann Comhairle showed bias and acted *ultra vires.* The criticisms of the Ceann Comhairle's remarks are advanced, notwithstanding the express provision in Article 15.13 of the Constitution that:

> "The members of each House of the Oireachtas shall […] be privileged from arrest in going to and returning from, and while within the precincts of, either House, and shall

not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself."

I am in no doubt that the Ceann Comhairle's decision to communicate with party and group leaders is not a matter that is justiciable. Insofar as the complaint is made that legislation was passed with a reduced attendance of deputies, the complaint ignores the fact that the Constitution provides that all questions in the Houses of the Oireachtas are to be determined by a majority of the votes of the *members present and voting*. I am quite satisfied that the attempts to persuade a court to interfere with the internal procedures of the Oireachtas, as the applicants seek to do, must fail.

45. A new issue was raised by the applicants on the eve of the appeal hearing. They raise an issue of objective bias. They do so, having become aware of the fact that Patrick McCann SC and Charles Meenan SC (as he then was) were members of a team providing legal services to a public inquiry into the banking crisis of 2008. Mr. McCann SC was counsel for the State respondents in the High Court, while Mr. Justice Meenan was the judge before whom the application for leave to seek judicial review came on for hearing. In 2014, the Houses of the Oireachtas published a tender seeking a team of suitably qualified legal practitioners. The applicants say that the fact of the tender process, which brought together a number of barristers to form a team, differentiates their situation from the normal one of barristers briefed as individuals by an instructing solicitor and brought together as individuals. They contend that their concern is heightened by the fact that the High Court judge displayed a degree of disdain, aggression and hostility to the applicants. They contend that there was a grave danger that an objective person observing the proceedings, and becoming aware of the background, might well form the view that the Court did not have its mind open to persuasion by the evidence and the submission of the applicants. The

applicants' submissions make reference to cases such as *Bula v. Tara Mines (No. 6)* [2000] 4 IR 412 and *Kenny v. TCD* [2008] IESC 18.

46. The applicants acknowledge that the nature of the barristers' profession is that members of the Bar find themselves involved in cases with and against colleagues and recognise that if one of the barristers then becomes a judge, the fact of having acted with or against a practitioner appearing before him or her does not present a difficulty. However, the applicants say the fact that Mr. Justice Meenan and Mr. McCann were among a group of barristers, who came together as a team to tender with a view to providing services to the Houses of the Oireachtas, takes the situation out of the ordinary. The respondents say that the involvement in a banking inquiry together several years ago could not conceivably come near the level of reasonable apprehension of bias. It must be noted that the reasonable bystander from whose perspective the matter is judged, is just that; a reasonable bystander, not a devotee of conspiracy theories. I cannot believe that any reasonable bystander would be concerned. On the contrary, I believe that a reasonable bystander would view any suggestion of there being a basis for concern as fanciful. So far as the applicants now seek to draw support for their concerns from the judge's conduct and demeanour during the trial, such criticisms formed no part of the appeal and do not impress. Indeed, I am bound to say that the raising of this issue at this stage and in this manner smacks of desperation.

47. In addition, the applicants have contended that various provisions of the legislation were contrary to certain Articles of the European Convention on Human Rights and contrary to the EU Charter of Fundamental Rights. The trial judge proceeded on the basis that the European Convention on Human Rights was not directly effective and measures cannot be invalidated on the basis that they are repugnant to it, and also accepted a submission made to him by the respondents that the Charter of Fundamental Rights and/or other EU law does not apply. The European Convention on Human Rights is not part of our domestic law and

cannot be relied upon to strike down legislation. That is not at all to say that it does not have an important role in informing judicial consideration of the extent of various rights and the extent to which and the circumstances under which rights that are generally available might be curtailed. Again, the High Court judge was, in my view, clearly correct in taking the view that the Charter of Fundamental Rights was not applicable because its relevance arises when EU law is being interpreted and implemented, and there is no EU law at issue in this litigation.

48. Overall, I am of the view that these proceedings, controversial as they are and tendentious as they are, do not raise any serious legal issue which would justify the grant of leave. Quite simply, they involve the applicants claiming to know better than the government and the Oireachtas. They dismiss the advice available to the government, whether internal or international. By way of example, the first named applicant refers to the World Health Organisation as a "private corporation". Allegations of treason are laid against the respondents and notice parties. While the underlying circumstances that have precipitated action on the part of the respondents and notice parties are extraordinarily grave, and while the measures taken in response have been very far-reaching, in my view, these proceedings have singularly failed to raise issues of substance. The applicants have chosen rhetoric over substance and fiction and distortion over fact. In my view, they have singularly failed to meet the threshold of establishing an arguable case.

49. I am quite satisfied that the approach in the High Court was the correct one and that this is an appeal that should be dismissed.

50. As the events of the COVID-19 pandemic required this judgment to be delivered electronically, the views of my colleagues are set out at the end of this judgment.

51. In relation to the question of the costs of the appeal, the ordinary rule is that costs follow the event and that the unsuccessful appellants pay the costs of successful respondents

and notice parties. Unless we are requested to consider departing from the ordinary rule, that is what will happen in this case. If any party is urging that there should be a departure from the ordinary rule, then that fact should be indicated in writing to the Registrar of the Court within seven days of this judgment appearing on the Courts Service website. Thereafter, all parties interested should provide submissions in writing, not exceeding 1,200 words, within a further seven days. Parties considering whether to seek separate adjudication on the issue of costs should bear in mind that doing so may result in additional costs being incurred.

Edwards J:

I have had the opportunity to read the judgment delivered by the President and I agree with the conclusions reached therein.

Costello J:

I have read the judgment of the President and I agree with both his reasoning and the decision and I too would dismiss the appeal.