AN CHÚIRT UACHTARACH

THE SUPREME COURT

S: AP:IE: 2022:000077

[2023] IESC 15

O'Donnell C.J.
Dunne J.
Charleton J.
O'Malley J.
Baker J.
Hogan J.
Collins J.

Between/

EMMETT CORCORAN AND ONCOR VENTURES LIMITED

TRADING AS THE DEMOCRAT

Applicants/Respondents

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondents/Appellants

JUDGMENT of Mr. Justice Gerard Hogan delivered the 22nd day of June 2023

Part I - Introduction

Background

1. In the early hours of 16th December 2018, a deeply disturbing event took place at Falsk, Strokestown, Co. Roscommon. Some five days earlier a local property had been repossessed pursuant to a court order and security personnel then went into occupation of the property. Very early on that morning of the 16th December, however, a number of masked and armed people attended the premises, attacked and injured the security personnel and set a number of vehicles alight. It appears that a firearm may have been used and that some of the security personnel were falsely imprisoned during the course of these events. While it is understood that three persons have recently been convicted of certain offences arising from this incident, these events also gave rise to the judicial review proceedings which are the subject of the present appeal. In these proceedings the editor of a local newspaper and the newspaper itself (the latter in its corporate guise) seek to have two separate search warrants issued by the District Court in April 2019 quashed. These warrants were issued by the District Court on the application of Gardai investigating the December 2018 incident.

2. The warrants had authorised the search of the home of the newspaper editor, Emmett Corcoran, along with the premises of the newspaper in question. The Gardaí had sought the warrants from the District Court pursuant to the provisions of s. 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 ("the 1997 Act") (as inserted by s. 6(1)(a) of the Criminal Justice Act 2006) since they contended that Mr. Corcoran was in possession of certain information (such as videos and photographs) on his mobile telephone which might help to assist them in their investigation of this incident. For his part, Mr. Corcoran maintained that this material was protected from disclosure by journalistic privilege. The present appeal accordingly raises important issues concerning both the power to grant a search warrant on the one hand and the scope of journalistic privilege on the other.

3. Before considering these issues, however, it is first necessary to say something in greater detail about the background facts. In 2018, a local weekly newspaper known as '*The Democrat'* was incorporated by Mr. Emmett Corcoran and a solicitor, Mr. Phelim O'Neill. *The Democrat* publishes locally in Longford, Leitrim and Roscommon and has an online presence. At the time of the incident in December 2018, sixteen or seventeen editions had been published with a weekly circulation of between 5,000 to 6,000 readers.

4. Mr. Corcoran resides in Strokestown, and it appears that he received a telephone message informing him of this incident. He attended in its immediate aftermath, taking photographs and videos on his mobile telephone which he then uploaded on *The Democrat's* website. These materials were viewed and reproduced many times.

5. On 19th December 2018, Mr. Corcoran was interviewed under caution by members of An Garda Síochána who were investigating the incident which had taken place three days earlier. Although Mr. Corcoran offered to make available all copies of videos and photographs which he took on the occasion, he declined to reveal his sources, including in particular, the identity of the individual who had alerted him to the event. In this respect he asserted journalistic privilege in respect of this material, telling the investigating Gardaí that he was "more than happy to assist in any way", but that he could not "compromise [his] journalistic integrity or [his] sources.". It is important to state that it is accepted that Mr. Corcoran is a bona fide journalist who was merely seeking to report on the incident.

6. On 2nd April 2019, a Sergeant Siggins (who was one of the local Gardai investigating the incident) applied *ex parte* to a District Judge in Roscommon for two search warrants: one in respect of Mr. Corcoran's house, and one in respect of *The Democrat's* premises. The application was made pursuant to s. 10 of the 1997 Act. For the purposes of that section, a judge of the District Court may issue a warrant for the search of that place and of any

persons found at that place so long as they are satisfied by information on oath of a member of An Garda Síochána not below the rank of Sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence may be found.

7. In the information grounding the application for the search warrants Sergeant Siggins attested that he believed that further video footage which might identify other suspects sought in respect of the investigation of the incident of 16th December 2018 may be found on the mobile telephone of Mr. Corcoran, from which the public materials available on *The Democrat.ie* website was downloaded, or on other computers or media devices found at *The Democrat.ie* premises or in Mr. Corcoran's house. Sergeant Siggins did so on the basis that one of the injured security personnel had made a statement to the Gardaí to the effect that, following the attack on 16th December 2018, he saw a Peugeot vehicle pulling up to the scene with two men inside while the officer was on the ground. The security officer in question stated that a male matching Mr. Corcoran's description was recording these events with a mobile telephone. He also described Mr. Corcoran as having been accompanied by a man in a balaclava who was wearing a camouflage jacket bearing certain distinctive markings. The man in question was holding a wooden cudgel with a knotted head. The security personnel stated that both men left the scene as emergency services arrived.

8. It was noted in the course of the proceedings in the High Court ([2020] IEHC 382; [2021] IEHC 11) and in the Court of Appeal ([2022] IECA 98) that Sergeant Siggins' information did not record that Mr. Corcoran is a journalist or that *The Democrat* is a local newspaper. In her judgment in the Court of Appeal, Costello J. also drew attention to the fact that Sergeant Siggins had not stated in the information that Mr. Corcoran refused to identify his sources during an interview under caution and that he had asserted journalistic privilege. It was further noted that there was no evidence that the District Judge was told that the applicant's rights under the Constitution and Article 10 of the European Convention on

Human Rights ('ECHR') were engaged, or that he was given any guidance as to the jurisprudence applicable in these circumstances, or the threshold which must be satisfied before those rights could be interfered with by issuing the warrant.

9. On 4th April 2019, Sergeant Siggins attended Mr. Corcoran's home, intending to seize his mobile telephone on foot of the warrant. Mr. Corcoran handed over the telephone under protest. The telephone itself was turned off and Mr. Corcoran refused to inform Sergeant Siggins of the password which would enable the content of the device to be immediately accessible.

10. Mr. Corcoran immediately applied for leave to seek judicial review in the High Court on the afternoon of 4th April 2019, before any members of the Gardaí Síochána could access the telephone's data. Mr. Corcoran sought leave to obtain an order of *certiorari* in respect of the warrant and an order of *mandamus* requiring the Garda Síochána to deliver over to Mr. Corcoran all and any information accessed on the mobile telephone, alongside the deletion of any copies they may have retained.

11. Noonan J. granted leave to apply for judicial review on that day. He also granted a stay preventing members of An Garda Síochána examining or otherwise attempting to access information on the telephone until 10.45 a.m. on 5th April 2019, which was the following day. On that date An Garda Síochána gave an undertaking not to examine or otherwise attempt to access information on the mobile telephone pending further orders. It is important to emphasise that this remains the position to this day so that the contents of Mr. Corcoran's mobile telephone remain secure.

12. A statement of opposition was filed by An Garda Síochána on 21st June 2019, in which the Commissioner pleaded that the matters brought by the applicant did not give rise to any justiciable issue, denying that 'journalistic privilege' existed in respect of the mobile

telephone. Prior to their filing opposition papers, An Garda Síochána had written an open letter to Mr. Corcoran's solicitors dated 10th May 2019, offering to compromise the proceedings on certain terms. The Gardai in essence had offered to limit their examination of the contents of the mobile telephone to the following items:

a. The telephone calls to and from the mobile telephone for the period of the 11th-17th December 2018 inclusive;

b. The emails and text messages, including other social media messaging services such as Whatsapp, Facebook Messenger etc., sent from and received to the phone for the period of the 11th-17th December 2018 inclusive;

c. The images contained on the memory of the mobile telephone which were either captured, uploaded or placed onto the phone in the period of 11th-17th December 2018 inclusive;

d. The videos which were recorded, uploaded or otherwise placed on the mobile telephone in the period of the 11th-17th December 2018 inclusive;

e. Other information contained in the telephone which was uploaded to it in the period of the 11th-17th December 2018 inclusive.

13. The applicants responded via their solicitors to this letter on 13th August 2019, indicating that their clients never had any difficulty with providing videos and photographs taken at the scene of the relevant incident to investigating members of An Garda Síochána, and, indeed, had already done so voluntarily. The letter indicated agreement to items (c) and (d) above only.

14. An Garda Síochána made a substantive response by letter dated 1st November 2019, explaining the rationale for the dates requested in their letter of 10th May 2019. The parties

were unable to reach an agreement, however, and the proceedings accordingly did not settle. The application for judicial review came on for full hearing before Simons J. for three days commencing on 14th July 2020.

Part II - The judgments of the High Court and the Court of Appeal

High Court Judgment

15. Judgment was delivered by Simons J. on 11th September 2020 ([2020] IEHC 382)) in which he decided that, absent a breach of the ECHR or the Constitution, An Garda Síochána had acted lawfully in invoking the procedure under s. 10 of the 1997 Act. In so deciding Simons J. held that a journalist may not pre-empt a court of law's adjudication as to the granting of a search warrant by simply asserting journalistic privilege, stating that the applicant's *presumption* that he could rely on journalistic privilege as a blanket protection was not well-founded and there was no such absolute right. Simons J. held that, rather, where journalistic privilege is asserted, that a balancing exercise must be conducted between the public interest in ensuring that all relevant evidence is available in criminal proceedings and investigations and the assertion of journalistic privilege.

16. In conducting this balancing exercise, Simons J. concluded that while in certain circumstances a journalist may have an implied or derived right to protect the identity of their confidential sources as a corollary of the right to freedom of expression, that such is not an inviolable or absolute right, and that it may be outweighed by the obligation to give relevant testimony with respect for criminal conduct. Simons J. concluded that in the instant case the public interest outweighed the assertion of privilege, having regard [at 102] to the fact that the evidence did not establish that the journalist's source was motivated by a desire to provide information the public was entitled to know.

17. Simons J. ordered therefore that An Garda Síochána could access and examine the content of Mr Corcoran's phone, subject to the limitation that only emails and texts, social media

inclusive, images and videos downloaded to the phone, and other information uploaded from the phone between 11th-17th December 2018 inclusive were to be accessed and accessible. Such a limitation, Simons J. stated, was necessary to ensure that the interference with the appellant's rights was proportionate.

18. In the course of his judgment, Simons J. had regard to the fact that a central dispute between the parties was which procedural mechanism by which, and the forum by which, the balancing exercise is to be determined. Simons J. noted that a gravamen of the applicant's case to this effect was that the Oireachtas had failed to enact legislation which prescribed an appropriate procedure by which this may be carried out, which was contrary to the ECHR jurisprudence on the matter.

19. In this respect, Simons J., rejected the applicant's contention that the District Judge ought to conduct this balancing exercise in the course of the application for a search warrant, concluding instead that it was appropriate for him, in exercising his jurisdiction on judicial review to so conduct it. Simons J. concluded that the terms of s. 10 of the 1997 Act confer on the District Judge a discretion to grant a warrant on the basis that they are satisfied that there are grounds for suspecting that evidence is to be found where the warrant is sought alone. The legislation does not consider other rights or privileges, and as such, the District Judge has no jurisdiction to consider them. Simons J. further held that it would be inappropriate for the District Judge to conduct this exercise, having regard for the *ex parte* and in camera nature of search warrant applications.

20. Following further argument regarding the nature of the relief claimed, Simons J. delivered a supplementary judgment on 4th January 2021: [2021] IEHC 11. In that supplementary judgment Simons J. re-examined the form of his limited order in light of written submissions filed by An Garda Síochána following the delivery of the principal judgment, in which they contended that it would not be technically or logistically possible to

download only part of the content of a mobile telephone. In their submissions, An Garda Síochána explained that it would be necessary to download and decode the full file system, and that following that, a report would be prepared which identified the relevant content.

21. Accounting for this information, Simons J. revised his proposed order to take the form of an injunction, restraining An Garda Síochána from accessing and examining the content of the mobile telephone other than in accordance with the following procedure:

a. The report which identified the relevant content over the period of 11th-17th December 2018 is to be transferred to an encrypted device to a nominated member of An Garda Síochána with the rank of Chief Superintendent, independent from and unconnected to the investigation of the events of 16th December 2018.

b. This report is to be supplied to the investigating team and applicant's solicitor.

c. Once the report is supplied, the full file system is to be deleted.

d. The Chief Superintendent will retain the mobile telephone as it may be necessary to produce the device as evidence in the pending criminal proceedings.

22. Simons J. issued a stay on the order for a period of 28-days from the date of their perfection, with the proviso that should an appeal be filed within that period that the stay will continue until the determination of the appeal or until such a date as may otherwise be directed by the appellate court. Simons J. noted that both parties were at their liberty to appeal, and that in the case that an appeal is unsuccessful, that both parties were at liberty to apply to the High Court to fine-tune the precise form of the order in light of any technological advances in the interim.

Matters preceding the Court of Appeal hearing

23. Following the supplemental judgment of Simons J. which had been delivered on 4th January 2021, the Commissioner applied a few weeks later, on 12th February 2021 to the High Court to clarify the issue of accessing the contacts on Mr. Corcoran's mobile telephone. The

Commissioner submitted that he understood paragraph 129 of the principal judgment (in which Simons J. set out the proposed order for what content was to be examined by An Garda Síochána) to grant him access to the details of Mr. Corcoran's contacts on the phone, but that the supplemental judgment stated clearly that this was not the case.

24. This motion was listed for mention in the High Court on 9th March 2021. The matter was subsequently adjourned until 25th March 2021, following the applicants' indication that they wished to cross-appeal the substantive decision of the principal judgment and the indication that they would be applying for a 'leapfrog' appeal to this Court.

25. On 10th May 2021 this Court refused to grant the applicant's leave in respect of a "leapfrog" appeal under Article 34.5.4° of the Constitution. The Commissioner then served a notice to the cross-appeal containing their own cross-appeal in respect of the exclusion of the contact details from Simon J.'s order. This was listed for hearing on 22nd November 2021, in the Court of Appeal.

Court of Appeal Judgment

26. In a comprehensive judgment delivered on 22nd April 2022 ([2020] IECA 98), Costello J. reviewed the provisions of the 1997 Act and the applicable law under the ECHR in relation to search warrant applications. Rejecting that it was necessary to determine whether the applicants' claim to withhold documentation or information was valid, Costello J. decided the appeal in relation to the narrow ground of what is the correct procedure to follow in order to access the information on the mobile telephone. In this respect, Costello J. held that the District Judge has jurisdiction to, and in fact *must* balance the competing rights of the public interest in the investigation and the prevention of crime and the rights of journalists, rejecting that a review and *ex post facto* balancing of the rights after a warrant is issued to be compliant with the Constitution.

27. Costello J. held that under s. 10 of the 1997 Act, a member of An Garda Síochána was permitted to apply *ex parte* to a District Judge for a search warrant of a journalist's home or place of work, provided the District Judge is informed that the application engages, or potentially engages, journalistic privilege, that such privilege is protected by the Constitution and the ECHR, that it may be overridden, and that the judge may only issue the warrant if the applicant convincingly establishes that there is an overriding requirement in the public interest that justifies such an order *and* the applicant makes full disclosure of all material facts pertinent to the issuance of a warrant.

28. Costello J. accordingly concluded that the District Judge in the instant case ought to have been so furnished with the information that the constitutional and ECHR rights of Mr Corcoran were engaged, been provided with the relevant jurisprudence, and been informed that the justification of the issue of the warrant was dependent on the finding of an existing public interest which overrides that journalistic privilege. As this did not occur, Costello J. held that the Commissioner was not entitled to access any information obtained pursuant to the warrant issued 2nd April 2019, and therefore that the mobile telephone should be returned to Mr. Corcoran.

The Application for Leave and Determination

29. The Commissioner applied for leave to this Court to appeal the order of the Court of Appeal made 25th May 2022, perfected 17th June 2022, by which that Court quashed the search warrant which was obtained by An Garda Síochána on 2nd April 2019, by Sergeant Siggins on application in the District Court.

30. Leave for appeal was granted by this Court in its determination of 30th September 2022: see *Corcoran v. Garda Commissioner* [2022] IESCDET 110. Leave was granted on the basis that the interaction of statutory provisions in Irish law permitting the grant of a search warrant and the protection of journalistic sources under the Constitution and the ECHR, as

well as the question of searching journalists' homes and offices and access to their telephones generally raised issues of general public importance.

Part III Issues before this Court and the submissions of the parties

31. The appellants (i.e., An Garda Síochána) have advanced five issues in respect of which they appeal:

a. Does s. 10 of the 1997 Act permit the District Court to carry out the balancing act between the public interest in the investigation and the prevention of crime and the rights of journalist envisaged by the Court of Appeal?

b. Does the application of *Samona Uitgevers B.V. v. the Netherlands* (App No. 38224/03) justify a system of *ex post* review?

c. Do the conclusions of the Court of Appeal arise from the case made by the applicant?

d. Were the Gardaí in breach of their disclosure obligations in applying for the warrant under s. 10 of the 1997 Act?

e. The appellant's cross-appeal in relation to the contacts issue.

32. The Commissioner contends that as search warrant applications are conducted *ex parte* and are characterised as a 'ministerial' act, that it would be inappropriate for a full-blown assessment of competing rights to be carried out in this kind of application. It would, in his contention, be radically re-imagine the role of the District Judge to determine that an obligation to undertake an elaborate exercise of balancing competing rights and interests exists and that nothing arises from a literal reading of s. 10 of the 1997 Act to justify doing so. In *ex parte* search warrant applications the District Judge has limited powers in granting the warrant, having no power to limit or effect a warrant's scope or to oversee how it is executed. As such, the Commissioner furthermore contends that there is no obligation on

the applicant in s. 10 proceedings to present 'full-picture' disclosure, insofar as such an obligation is only appropriate in *inter partes* hearings, where full-blown assessments of competing interests are possible.

33. Contrariwise, the appellant submits that *ex post* review by way of judicial review is more well-equipped and suited for a proportionality assessment. The High Court in judicial review proceedings is concerned with the administration of justice and as a matter of practicality, such interests and rights may only become apparent after material is seized and searched. The Commissioner contends that to cauterise the jurisdiction of *ex post* review, contrary to, and without considering the judgment of Charleton J. in *CRH v. Competition and Consumer Protection Commission* [2017] IESC 34, [2018] 1 IR 251, in which *ex post review* was identified as a satisfactory remedy, would be erroneous. The Commissioner contends that it would be furthermore incorrect to state that it is inconsistent with the ECHR jurisprudence, submitting that it is consistent with that jurisprudence to have a system of *ex post* review so long as review is conducted post seizure but prior to *access* of materials. The Commissioner contends that it was only determined that *ex post* review was inadequate in *Samona* insofar as on the facts of that case the material had been examined, so that review could be no remedy at that stage, but that such did not mean that *ex post* review was entirely precluded as a valid mechanism for vindicating the rights asserted.

34. On the assumption that *ex post* review is appropriate, the appellant submits that it is difficult to identify a basis on which the conclusions of Simons J. in the High Court should be interfered with by an appellate court. In any case, the Commissioner contends that there are defects in the judgment of the Court of Appeal. In particular, the Commissioner submits that the conclusions of the court did not follow the case asserted by the respondent. The argument that it was unlawful for the Gardaí to attempt to identify a journalist's source on foot of a search warrant, and hence, the declaration of unconstitutionality such a finding

would require, was abandoned by the respondent in the High Court. The Commissioner argues that on this basis, and insofar as the judgment did not engage with *CRH*, where *ex post* review was deemed appropriate, that it was unclear on what basis the Court of Appeal concluded that the process was unconstitutional. Moreover, the Commissioner contends that even were the case put to the Court of Appeal by the respondent that the appropriate remedy would have been a declaration of incompatibility with the Convention, and that in concluding that it was unconstitutional, the Court of Appeal mistakenly took the Convention and Constitution to be ad idem in respect of journalistic privilege and failed to have regard for their different procedural backgrounds in respect of the privilege. In doing so, the Court took convention-compliant constitutional interpretation to be an imperative, thereby mistakenly giving the Convention the same status as the Constitution. Owing to these defects, the Commissioner contends that the judgment of the Court of Appeal ought to have been departed from.

35. Mr. Corcoran, however, argued that if it is the case that there is no duty of 'full-picture' disclosure from the person applying for a warrant during the course of the initial application proceedings, where *all* rights which are implicated by a warrant are considered and factored in a balancing exercise assessment of whether the District Judge should utilise their discretion to grant or refuse the warrant, that it must be concluded that s. 10 of the 1997 Act does not meet the necessary procedural safeguards necessitated by constitutional justice, fair procedures, and Article 10 ECHR. The respondent contends that the power to conduct a balancing exercise is not a novel or controversial statement of the District Judge's powers to state that they ought to factor all the rights implicated by the warrant against the requirements of the public good, but rather that to conclude in that manner reflects the nature of the act they have always conducted in exercising their discretion to grant or refuse a search warrant application.

36. Mr. Corcoran submits that furthermore the existence of *ex post* review does not cure such defects, nor is it either legally nor logically satisfactory as a method of protection of journalists' rights: it is not prescribed by law, it cannot *guarantee* review before the material is accessed in a manner which is adequately accessible and foreseeable as required by the ECHR jurisprudence, and in any case, notwithstanding such defects, judicial review is an inappropriate forum even were it to be guaranteed as judicial review is a process to review lawfulness and jurisdiction and not a forum for the resolution of a dispute on its merits. *Ex post* review therefore fails to give effect to the Article 10 ECHR requirement that there are adequate legal safeguards. The conclusions of Simons J., therefore, were not appropriate in the respect that the judge did not have the jurisdiction to conclude on the matters. Mr. Corcoran furthermore contends that the order of Simons J. ought to be set aside in its entirety as there was both a general privilege on the content of the mobile phone which would be breached and a specific privilege not to disclose a journalist's sources which would be breached indirectly even if the order in which the contacts were anonymized were granted.

37. With respect to the Commissioner's cross-appeal, it is sufficient to note that this was not pursued at the hearing of this appeal. The decisions of the High Court and Court of Appeal which explicitly excluded Mr. Corcoran's contacts from the data the Gardaí were permitted to access the mobile telephone therefore does not need to be considered here.

38. While this case is principally about the search warrant power contained in s. 10 of the 1997 Act, the issue of journalistic privilege also looms large. It is, I think, accordingly necessary to examine aspects of this privilege before considering the scope of the s. 10 jurisdiction in any detail. As this Court pointed out in *Mahon v. Keena* [2009] IESC 64, [2010] 1 IR 336, the ambit of journalistic privilege clearly derives from Article 10 of the European Convention of Human Rights as applied in a domestic context by ss. 2 and 3 of the

European Convention of Human Rights Act 2003 ("the 2003 Act"). For my part I also consider that provisions of Article 40.6.1° of the Constitution read in conjunction with Article 5 also leads to broadly the same result. I propose to commence with a consideration of the relevant ECHR provisions given that the Article 10 ECHR case-law to date on this topic is quite developed.

Part IV - Article 10 ECHR and ss. 2 and 3 of the European Convention of Human Rights Act 2003

39. As this Court has so frequently stressed, the European Convention of Human Rights is not, as such, directly part of our domestic law: see, *e.g., McD v. L* [2009] IESC 81, [2010] 2 IR 199 at 246-249 per Murray C.J. Nor is it necessary in this context to consider aspects of the inter-action between the ECHR and the Constitution which this Court has had occasion to examine in some of its recent case-law: see, *e.g., Middelkamp v. Minister for Justice* [2023] IESC 2. It is, however, sufficient to observe that An Garda Síochána are an "organ of the State" for the purposes of s. 3 of the 2003 Act. This provision requires such bodies "to do so in a manner compatible with the State's obligations under the Convention's provisions." While the courts are excluded from the definition of "organs of the State" by s. 1(1) of the 2003 Act – with the consequence that the s. 3 obligation does not apply to them – they are nonetheless obliged to abide by the quite separate interpretative obligation contained in s. 2(1):

> "In interpreting and applying any statutory provision or rule of law, a court shall, in so far as possible, subject to the rules of law relating to interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

40. Perhaps it would not also be out of place to draw attention here to the solemn declaration which each member of An Garda Síochána as required by s. 16(1) of the Garda Siochana Act 2005 to make before a Peace Commissioner:

> " I will faithfully discharge the duties of a member of the Garda Síochána with fairness, integrity, regard for human rights, diligence and impartiality, upholding the Constitution and the laws and according equal respect to all people…"

41. I propose to examine presently how the 2003 Act comes to be applied on the facts of this case. Turning, however, to the substantive provisions of Article 10 ECHR, it has been clear for some time that the right to protection of journalistic sources is regarded by the European Court of Human Rights as a key aspect of the right of free speech contained in this provision. Many of the leading authorities are quoted at length in the judgment of Fennelly J. for this Court in *Mahon v. Keena*. They all stress that in a free and democratic society the media play a special role, and that role could not properly be discharged unless journalists could, at least in principle, protect their sources.

42. As the ECtHR made clear in *Goodwin v. United Kingdom* (1996) 22 EHRR 123 [at 38]:

> "Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms…Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the

exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

43. This principle has been repeatedly emphasized by the ECtHR in a series of case. It perhaps suffices for present purposes to refer to two representative decisions. In *Sanoma Uitgevers B.V. v. Netherlands* [2010] ECHR 1273 the applicant company was the publisher of a specialist motoring magazine. In January 2002 the organisers of an illegal street race contacted journalists attached to the magazine. The journalists in question were given an opportunity of photographing the proposed race on condition that the identities of the participants would remain undisclosed. A few weeks later the editor of the magazine was detained and in effect directed by the police authorities to hand over documentation which would have assisted in the identification of the race participants. This they did under protest. The ECtHR ultimately held that the Dutch legislation breached Article 10 ECHR in particular because it did not contain adequate safeguards which would have enabled an independent adjudication of the claim of journalistic privilege.

44. The Court once again confirmed [at 50] that the general right of journalist to protect their sources was part of the freedom to receive and impart information and ideas without interference by public authorities within the meaning of Article 10(1) ECHR:

"It is a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected."

45. That case concerned [at 72] an order for the "compulsory surrender of journalistic material which contained information capable of identifying journalistic sources." This is in itself

was sufficient to demonstrate the existence of an interference with the applicant company's Article 10(1) ECHR rights. The Court then proceeded to hold that the Dutch order was not "prescribed by law" within the meaning of Article 10 because Dutch law and practice did not contain the appropriate safeguards.

46. At the heart of these safeguards was that of an independent review of the claim of journalistic privilege by a judge or other similar personage. With clear echoes of what this Court subsequently was to say in *Damache v. Director of Public Prosecutions* [2012] IESC 11, [2012] 2 IR 666, the ECtHR concluded [at 100] that:

> "…the quality of the law was deficient in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources. There has accordingly been a violation of the Convention in that the interference complained of was not 'prescribed by law.'"

47. A similar approach was taken by the same Court in *Nagla v. Latvia* [2013] ECHR 781. Here a journalist had received information from a source to the effect that he (the source) had detected flaws in the security system protecting the database of taxpayers maintained by the Latvian revenue authorities. The journalist then informed the Latvian Revenue Service of this, but also publicly broadcast the fact that there had been a significant leak of sensitive data regarding particular taxpayers from that database. The investigating police subsequently obtained various search warrants authorising them to search Ms. Nagla's home and various data storage devices were seized.

48. The ECtHR ultimately found that there had been a breach of Article 10 ECHR in that [at 101] "the investigating judge failed to establish that the interests of the investigation in

securing evidence were sufficient to override the public interest in the protection of the journalist's freedom of expression, including source protection and protection against the handover of research material." What is interesting, however, for our purposes is that the Court found that Latvian law expressly contained safeguards designed to protect journalist's sources, specifically [at 87], a judicial assessment "of whether the interests of the criminal investigation override the public interest in the protection of journalistic sources."

49. The Court went on to note [at 90] that unlike the situation in *Sanoma* "the investigating judge has the authority under Latvian law to revoke the search warrant and to declare such evidence inadmissible. Moreover…the investigating judge also has the power to withhold the disclosure of the identity of journalistic sources." These safeguards meant that, unlike the position in *Sanoma*, the interference complained of was "prescribed by law" within the meaning of Article 10(2) ECHR, even if the actual order made by the investigating judge was itself found to be disproportionate.

The distinction between the journalist(s) and the source(s)

50. It is also necessary at this point to separate out a distinction between the journalists and the source, something which the ECtHR has also addressed in a series of important cases, of which its decision in *Stichting Ostade Blade v. Netherlands* [2014] ECHR 813 can be regarded as representative. Here an extremist environmental group sent a form of press statement to a self-described activist magazine in which it claimed responsibility for a bombing in the town of Arnhem in 1996. This statement was then published by the magazine.

51. The Dutch police subsequently obtained court orders enabling them to search the premises of the magazine in question. The journalists in question had, however, destroyed the

original of the press release in order to ensure that the identity of its author would not be compromised. The Court ultimately held that in these circumstances there was no actual breach of Article 10 ECHR.

52. It noted [at 62] that not every "individual who is used by a journalist is a 'source'" in the sense of its post-*Goodwin* case-law, since [at 63] sources were those "who freely assisted the press to inform the public about matters of public interest or matters concerning others." (In passing one might equally note that Article 40.6.1° of the Constitution speaks about the role of the media in the education of public opinion.)

53. The ECtHR added that neither persons who were not sources in that sense nor the journalists who employed them were entitled to the same level of Article 10 protection. Given that the magazine's informant had sought [at 65] to seek publicity and "to don the veil of anonymity with a view to evading his own criminal accountability", the Court concluded that this person was not a 'source' in the *Goodwin* sense.

54. This case has obvious potential relevance for any discussion of the scope of privilege in the present case. It might very well be that given the circumstances in which the telephone call was made to Mr. Corcoran in the first instance that the identity of the caller would not be entitled to Article 10 protection given that it seems unlikely that his motives were benign. The whole point, however, is that the District Judge was entitled to have been told that Mr. Corcoran was a journalistic who had always asserted journalistic privilege in respect of this material before any disclosure order was ultimately made by the District Court.

Part V - The relevant constitutional provisions

55. I now propose to consider separately the question of whether journalistic privilege enjoys constitutional protection. It bears remarking that this issue was not fully debated at the

hearing of the appeal, although counsel for the State respondents did concede that Article 40.6.1° had the same approximate scope and effect as Article 10 ECHR. In view of the fact that this matter was not the subject of any real debate before this Court I do not now propose to base my actual judgment on these constitutional questions. While I consider that Article 40.6.1° cannot simply be overlooked in this debate, the views which I now express on these questions are simply observations on my part and should be regarded as being strictly *obiter dicta.*

56. Article 40.6.1° of the Constitution guarantees the right of citizens to express freely their convictions and opinions. This right is not, of course, an unqualified one, as it is attended by a variety of provisos, including subjecting the exercise of this right to considerations of public order and morality. But embedded within a key proviso to Article 40.6.1° itself is an acknowledgement that the "rightful liberty of expression" of the "organs of public opinion" – such as the media generally – includes "criticism of Government policy". These phrases acknowledge the special role which the media plays in the constitutional order. In Carolan's words, "Protecting Public Interest Reporting: What is the Future of Journalistic Privilege in Irish Law" (2017) 67 *Irish Jurist* 187 at 191:

> "Unlike Article 10 of the Convention, the text of Article 40.6.1°(i) specifically acknowledges the press as a protected organ of public opinion. Furthermore, the decisions of the courts in recent years have consistently affirmed that this is a privileged constitutional position that reflects the vital role played by the press in a democratic society."

57. I cannot help thinking that the impact of these provisions has perhaps received insufficient judicial recognition in the case-law to date. In *Re Kevin O'Kelly* (1974) 108 ILTR 97 (a

judgment of the Court of Criminal Appeal) Walsh J. adverted to the possible impact of Article 40.6.1° before saying (at 101) that this meant that:

> "…a journalist has the right to publish news and the right carries with it, of course, as a corollary the right to gather the news. No official or governmental approval or consent is required for the gathering of news or the publishing of news. It is also understandable that newsmen may require information to gather news. It is also obvious that not every news-gathering relationship from a journalist's point of view requires confidentiality. But even where it does, journalists or reporters are not any more constitutionally or legally immune than other citizens from disclosing information received in confidence..."

58. The decision in *O'Kelly* concerned the refusal of a well-known journalist to confirm the identity of the self-styled and so-called "Chief of Staff" of an illegal organisation - whom he had openly interviewed for a radio news programme broadcast by RTÉ - in the course of giving evidence in a criminal prosecution of that person for such membership. When the journalist in question refused to answer the question as to the identity of the person whom he had openly interviewed, he was then found guilty of contempt by the Special Criminal Court. He then appealed that conviction to the Court of Criminal Appeal which affirmed his conviction, albeit that his sentence of imprisonment was suspended on appeal.

59. Given that there was no question here on these facts of revealing confidential sources, then, as Costello J. noted in her judgment in the Court of Appeal, many of these comments were, in strictness, probably obiter. In any event, the actual result in *O'Kelly* was clearly correct on its own facts. The journalist's evidence was plainly relevant and necessary for the prosecution case and there was no question, as I have just stated, of compromising any sources.

60. The reasoning in *O'Kelly* has, in any event, been overtaken by judicial developments in the meantime, most notably the decision of this Court in *Mahon v. Keena* and a long line of Article 10 ECHR judgments from the European Court of Human Rights in which the existence of the right of journalists to protect their sources has been judicially recognised. (I shall return presently to this point.) But returning to the judgment of Walsh J. in *O'Kelly,* what remained unsaid in the passage I have just quoted is that the Constitution *itself* recognises that the media stand in a somewhat different position to that of ordinary citizens so far as holding the Government (and, for that matter, wider society in general) to account. With all due respect to the comments of Walsh J., it is, I think, unrealistic to suggest that the media could discharge this function of educating public opinion and critiquing Government policy without at least some degree of protection of journalistic sources. Without an assurance – whether express or implied — as to confidentiality who would, for example, be prepared potentially to damage or even imperil their reputation and employment prospects by disclosing sensitive material to a journalist? What would then be left of the substance of the general right to express opinions and convictions in Article 40.6.1°?

61. As this Court recently pointed out in *Costello v. Ireland* [2022] IESC 44 the democracy guarantee in Article 5 is a fundamental part of the State's constitutional identity. Democracy in this sense is, of course, rather more than simply filling in ballot papers at elections and referenda, vital though this is: it also presupposes, for example, as I put in the referendum context in *Doherty v. Referendum Commission* [2012] IEHC 211, [2012] 2 IR 594, at 604, the existence of an informed and deliberative societal and political discourse is thereby presupposed:

> "…by urging the citizenry to engage in robust political debate so that the forces of deliberation will prevail over the arbitrary and irrational so that, in this civic democracy, reasoned argument would prevail in this triumph of discourse."

62. While few would be naïve or starry-eyed enough to believe that we had achieved a perfect form of Athenian civic democracy of a kind of which the shades of Pericles and Thucydides might be proud, at the same time, in the very words of Article 40.6.1°, the "education of public opinion" and allowing for robust political debate is vital if the life blood of the democratic order envisaged by Article 5 is to be safeguarded. This, at any rate, is the role which Article 40.6.1° assigns to the media. It has been given the task of holding up a mirror to society and government so that the public can form their own – inevitably diverse – opinions as to how the problems and issues of the day can be best addressed.

63. Without a free press there is no democracy. And the protection of sources is integral to a free press. It can thus be said that the inter-action of the State's constitutional identity as a democracy as provided for in Article 5 and the freedom of expression provisions of Article 40.6.1° combine to give constitutional standing to the protection of journalistic sources. Of course, just as freedom of expression is not absolute, nor is the right to protect sources. But, in general and subject to important exceptions, the protection of journalistic sources enjoys constitutional protection and the case for overriding this protection in any given case must be convincingly established.

64. As I have already indicated, none of this could possibly be achieved without at some form of journalistic protection and an acknowledgment by the law that journalists play a special role within the democratic order. Human nature being what it is, that role could not be discharged if journalists could not – at least in general and subject to certain exceptions — protect their sources. The free flow of information which enables the media to educate

public opinion and to criticise Government policy in the manner envisaged by Article 40.6.1° would simply seize up without such protection. To that extent the general right of journalists to protect their sources is simply part and parcel of the special constitutional role which Article 40.6.1° assigns to them, even if this right itself is subject to important qualifications and exceptions.

65. As Costigan has observed, "Protection of journalists' sources" [2007] *Public Law* 464 at 464:

> "A condition of democracy is the free flow of information, which contributes to informed debate about the use and abuse of power. The media's ability to inform the public depends in part on the maintenance of source anonymity. If sources cannot be confident that their identities will be protected, many would not come forward with information. Compelling journalists to reveal their sources undermines their ability to fulfill their democratic role."

66. While this passage was written in the context of a discussion of (then) contemporary British decisions which were (in part) based on the emerging Strasbourg case law, together with s. 10 of the (UK) Contempt of Court Act 1981 (a statutory provision protecting journalists' sources which has no counterpart in this jurisdiction), they are, I suggest, at least as true of this jurisdiction as they are of the position of the media in the United Kingdom.

67. Of course, as Collins J. points out in the judgment he is about to deliver, robust debate political debate has existed in the State since its earliest foundations. To that extent I agree that of course it is quite possible to have robust debate on many subjects without having at least some degree of protection for journalistic sources. Yet the lived political experience of this State has also shown that without such protections for journalists, debate and public

discussion in respect of important topics of public interest – often otherwise hidden from public view – will be considerably hampered and compromised, if not altogether stifled. And nor is this simply a case of interpreting Article 40.6.1° so that it accords with the requirements of Article 10 ECHR. I take the view that some protection for the work of journalists is an essential protection of free speech and democratic debate – thus coming within the rubric of Article 5 and Article 40.6.1° — and this would be so even if, to paraphrase the words of Finlay P. in *The State (C.) v. Frawley* [1976] IR 365, at 374, there had never been a European Convention of Human Rights or Ireland had never been a party to it.

68. There remains the important question of the present-day status of *Re Kevin O'Kelly.* As I read the judgment which Collins J. is about to deliver, he suggests (i) that it was unaffected by the decision of this Court in *Mahon v. Keena* and (ii) that *Re Kevin O'Kelly* remains (and perhaps should remain) the rule in constitutional matters and (iii) that *Mahon v. Keena* governs this issue at the level of the 2003 Act and the ECHR more generally. At the level of principle, I respectfully wonder whether this could properly be so.

69. The premise of the judgment of Walsh J. in *Re Kevin O'Kelly* was that the proper administration of justice in Article 34.1 generally requires that the public had the right to every person's evidence, save for some constitutionally required or legally established privilege (and that journalistic privilege did not come within the latter category of privilege) which the relevant party can properly invoke. *If* (contrary to the views I have just expressed and will further express in this judgment) the Constitution mandates this outcome (which I shall term "Result A"), then I do not see how the 2003 Act could be interpreted so as to reach the very opposite result ("Result B") by reference to the ECHR and the *Goodwin* jurisprudence. That would be tantamount to saying that the Convention enjoyed a superior

status to that of the Constitution and that judgments of the ECtHR enjoying a binding status akin to that of the Court of Justice of the European Union.

70. While these issues were perhaps somewhat imperfectly explored in *Mahon v. Keena*, if *Re Kevin O'Kelly* remains good law ("Result A") in the sphere of constitutional law, then I struggle to understand how this Court arrived at the conclusion which it did in *Mahon v Keena* ("Result B") since, for reasons which are quite obvious, the reasoning and the results in the two cases are mutually incompatible.

71. This must also be so because in his judgment in *Mahon v. Keena,* Fennelly J. was at pains to stress that there was no *conflict* in this regard between the Constitution and the ECHR. Yet in my opinion he could not have said that if he still believed that *Re Kevin O'Kelly* – with its Article 34.1-based insistence on the right to the evidence of every person – was still good law because if *Re Kevin O'Kelly* is indeed good law there is an inescapable conflict between the Constitution and the ECHR. In those circumstances there can be only one winner as far as our legal system is concerned and this Court would have had no business in giving effect to the *Goodwin* line of jurisprudence.

The decision of the US Supreme Court in *Branzburg v. Hayes*

72. I am, of course, conscious of the fact that in *Branzburg v. Hayes* 408 US 665 (1972) a majority of the US Supreme Court rejected the argument that journalists enjoyed a First Amendment privilege to protect their sources. This case principally concerned the refusal of several reporters who had been subpoenaed to testify before grand juries investigating criminal wrongdoing to do so on the grounds of journalistic privilege. In the lead case, Mr. Branzburg had written an article for a local Kentucky newspaper describing the conduct of young persons who had had synthesized cannabis resin. The local law enforcement officials had demanded that Mr. Branzburg inform the grand jury of the identity of these persons. It

was against that background that privilege was asserted by the journalist in question. In the other cases other journalist had equally refused to co-operate with grand jury investigations and they had declined to reveal their sources concerning stories written about the Black Panther movement, a shadowy organization which had threatened violence against senior US politicians.

73. Here is not the place to parse and analyse this complex and important decision in any detail: a fine introduction to these matters may be found in Lewis, *Freedom for the Thought that We Hate: A Biography of the First Amendment* (Philadelphia, 2007) Chp. 6. Leaving aside the fact that the decision of White J. was for a simple plurality of the Court or that the concurring judgment of Powell J. making up the majority in *Branzburg* is more nuanced than that of the plurality, the decision – like *Re Kevin O'Kelly* – emphasises the importance for the criminal justice system of the obligation to testify which rests upon all witnesses. White J. further stressed how exceptions to that duty to testify have always been met with consistent judicial disfavour. The ultimate conclusions of White J. that the First Amendment conferred no such journalistic privilege from the obligation to co-operate with a criminal investigation may be said to proceed from that premise. This was also the general approach of Binnie J. in the corresponding decision of the Canadian Supreme Court in *R. v. National Post* [2010] 1 SCR 477 who stressed (at [40]) that giving constitutional protection to journalists in this way would leave "a giant hole in law enforcement and other constitutionally recognised values such as privacy."

74. For my part I find myself, with respect, nonetheless unconvinced by the line of reasoning in these two decisions. Not only is such reasoning inconsistent with the *Goodwin* jurisprudence of the ECtHR, but I also consider that, for all the reasons I have already endeavoured to explain, some form of constitutional protection for the work of journalists is essential if the constitutional values of free speech, the right to express freely one's

convictions and opinions, the right to criticise Government policy and, perhaps, above all, the integrity and overall health of our democratic system is to be safeguarded. Indeed, even such was to some extent conceded by White J. in *Branzburg* when he admitted (427 US at 681) that "without some protection for [those] seeking out the news, freedom of the press could be eviscerated."

75. In other words, just as I disagree with the reasoning of Walsh J. in *O'Kelly,* I likewise respectfully disagree with the premises of White J. in *Branzburg* and Binnie J. in *National Post* and the conclusions which they respectively draw from these premises.

Potential abuse of the privilege

76. Of course, just as with other privileges – such as, in particular, legal professional privilege – the scope of application of this privilege may be open to debate in individual cases. It is clear, for example, from long established authority that legal professional privilege cannot be used for the furtherance of a criminal purpose (*R. v. Cox and Railton* (1884) 14 QBD 153) or where the cloak of privilege is sought to be used to conceal the reasons for abusive proceedings involving "moral turpitude or dishonest conduct": see *Murphy v. Kirwan* [1993] 3 IR 501 at 511, per Finlay C.J. There may also be issues – yet to be really worked out in this jurisdiction – where an "innocence at stake" exception falls to be considered and applied.

77. The same can equally be said by analogy in respect of journalistic privilege, so that, for example, a journalist who participates in criminal activities cannot subsequently invoke the privilege in order to mask his or her involvement in those crimes. (There is, admittedly, one difference in that *within its proper scope of application* – and I emphasise those words - legal professional privilege if validly claimed is absolute and is not subject to a balancing test. This is *not* true in respect of a claim of journalistic privilege.) The rights guaranteed

by Article 10 ECHR and Article 40.6.1° are, after all, both qualified by considerations of public order.

78. A further issue which arises in the case of journalists is that of accreditation. Only professional lawyers (or their clients) practising as such can invoke legal professional privilege. The profession of journalism is not, however, a regulated profession in this sense and the advent of social media over the last two decades has simply served to blur the distinction between the traditional journalist employed by a recognised media outlet on the one hand and others (such as the "lonely pamphleteer" identified by White J. in *Branzburg* as far back as 1972) or, in the words of Binnie J. in *National Post* [at 43], the "immense variety and degree of professionalism (or lack of it) of persons" engaging in or dabbling in a form of journalism on the other: see, for example, *Cornec v. Morrice* [2012] IEHC 376, [2012] 1 IR 804, at 825 where I adverted in my judgment in that case to some of these issues. Other than drawing attention to these possible difficulties – which will probably arise in a future case – it is sufficient for present purposes to note that the journalistic protection of sources is, in general and subject to important exceptions required by considerations of public order and so forth, legally protected.

79. Finally, I also agree that the journalistic privilege may well be abused. Material may be - and frankly, often is - supplied to journalists for the most unworthy and basest of motives. The present case may well provide just another example of this. In his judgment Collins J. draws attention to an important judgment of the US Court of Appeals for the DC Circuit, *In re Judith Miller* 438 F. (3rd) 1138 (2006). This concerned the so-called Valerie Plame affair where senior US administration officials "leaked" a story which identified – or tended to identify – the spouse of a former US ambassador who had written an article critical of his government's claim that Iraq possessed weapons of mass destruction as being herself a CIA agent. This was apparently done simply for reasons of political revenge.

80. There is no doubt but *Re Judith Miller* is an example of an abuse of ideas of journalistic privilege. But there are few legal rules – particularly rules as to privilege – which cannot be abused. This nevertheless cannot take from the fact that protecting journalists in the discharge of their work is essential to the proper functioning of a free and democratic society (Article 5) and the safeguarding of the right of free speech (Article 40.6.1°) and that this can, generally speaking, best be done by protecting journalistic sources, even if this privilege is itself subject to important exceptions.

Part VI - Section 10 of the 1997 Act and the validity of the warrant

81. At this juncture it may be convenient to set out in full the terms of s. 10 of the 1997 Act (as inserted by s. 6(1)(a) of the Criminal Justice Act 2006). Section 10 of the 1997 Act provides:

> "(1) If a judge of the District Court is satisfied by information on oath of a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.
>
> (2) A search warrant under this section shall be expressed, and shall operate, to authorise a named member, accompanied by such other members or persons or both as the member thinks necessary—
>
> (a) to enter, at any time or times within one week of the date of issue of the warrant, on production if so requested of the warrant, and if necessary by the use of reasonable force, the place named in the warrant,
>
> (b) to search it and any persons found at that place and,

(c) to seize anything at that place, or anything found in the possession of a person present at that place at the time of the search, that the member reasonably believes to be evidence of, or relating to, the commission of an arrestable offence.

(3) A member acting under the authorisation of a search warrant under this section may—

(a) require any person present at the place where the search is being carried out to give the member his or her name and address, and

(b) arrest without warrant any person who—

(i) obstructs or attempts to obstruct the member in the carrying out of his or her duties,

(ii) fails to comply with a requirement under paragraph (a)

(iii) gives a name or address which the member has reasonable cause for believing is false or misleading.

(4) A person who obstructs or attempts to obstruct a member acting under the authority of a search warrant under this section, who fails to comply with a requirement under subsection (3)(A) or who gives a false or misleading name or address to a member shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both.

(5) The power to issue a warrant under this section is without prejudice to any other power conferred by statute to issue a warrant for the search of any place or person.

(6) In this section—

> ‘Arrestable offence’ has the meaning it has in section 2 (as amended by section 8 of the Criminal Justice Act 2006) of the Criminal Law Act 1997
>
> ‘place’ means a physical location and includes—
>
> (a) A dwelling, residence, building or abode,
>
> (b) A vehicle, whether mechanically propelled or not,
>
> (c) A vessel, whether sea-going or not,
>
> (d) An aircraft, whether capable of operation or not
>
> (e) A hovercraft.”

82. Perhaps the first thing to note about this section is that is that it contains no saver whatever in respect of privileged material whether by reason of journalistic privilege or, for that matter, legal professional privilege. This is in contrast to other broadly similar search warrant provisions which have made provision for the protection of legally privileged material: see, e.g., s. 9(2) of the Criminal Law Act 1976 and s. 48(6) of the Criminal Justice (Theft and Fraud Offences) Act 2001.

83. Next it may be observed that the section itself operates in a binary manner: the District Judge simply has two options, namely, whether to grant or to refuse the warrant as applied for. The judge is given no power to attach conditions to the grant of the warrant, such as, for example, imposing a temporary stay on the Gardaí accessing the contents of any documents (whether in electronic or paper form) pending a resolution of the question of whether the documents are, in fact, privileged. Nor, as Simons J. observed in his judgment in the High Court, is the judge given power to review any order which has been made in order to assess, for example, whether any claim for journalistic privilege should now be upheld.

84. In the present case it is, indeed, a matter of pure happenstance that the material in question was in electronic form which was not immediately accessible by the Gardaí without access

to a password. This enabled Mr. Corcoran to apply immediately to the High Court for judicial review challenging the legality of the warrant and to obtain what amounted in substance to injunctive relief restraining the Gardaí accessing the material pending fuller argument. Yet one might ask what, for example, would have happened if the name of the source had been recorded in an ordinary notebook, the contents of which had simply been read by the Gardai once they entered Mr. Corcoran's home or the offices of *The Democrat*?

85. The applicants did not challenge the constitutionality of s. 10 of the 1997 Act or seek a declaration as to its compatibility with the ECHR under s. 5(1) of the 2003 Act. This was possibly due to the exigencies of time and the urgent nature of the application to the High Court. In saying this I simply intend to note this fact: it is not in any sense intended to be a criticism of the applicants or their legal strategy. They merely wished, after all, to have the warrant quashed and in this they will ultimately have succeeded, as we shall shortly see.

86. Yet I cannot help thinking that these very proceedings have exposed serious shortcomings in s. 10 of the 1997 Act, both in terms of the ECHR and, for that matter, perhaps the Constitution as well. As matters stand, s. 10 allows for the making of an order without any express form of independent, merits-based review of the claim of privilege which a bona fide journalist might legitimately seek to make in order to protect their sources. The absence of a power of review of the claim of privilege would accordingly appear to be problematic. In *The State (Hughes) v. O'Hanrahan* [1986] ILRM 218, at 219 Henchy J. commented that it was in order for the High Court to make orders *ex parte* extending time to allow opposition papers to be filed. This procedure was, he reasoned, acceptable because even in those (relatively) rare cases where the other party was prejudiced by such extension, they could apply to the High Court to vacate or otherwise review the merits of the *ex parte* order:

> "I find nothing wrong in principle in making such an order *ex parte.* The order does not affect any matter in dispute between the parties. Nor, save in exceptional circumstances, can it prejudice the applicant. If the applicant finds that he is prejudiced by the extension of time, he may bring a notice of motion asking to have the extension set aside or modified. The court, in exercise of its inherent jurisdiction to set aside or vary an interlocutory order made *ex parte*, could make such order as it thought necessary to meet the justice of the case."

87. In *Hughes* the disputed practice fell lightly – if at all – on the constitutional rights of the other party. Here the situation is quite different because not only does the order in question potentially affect in a very significant way the fundamental right of journalists to protect the identity of their sources, there is simply no possibility provided for by s. 10 of the 1997 Act for the journalist in question to preserve the status quo and to apply to court so that the merits of that claim for journalistic privilege could be adjudicated upon. Nor is the District Court given the power to limit in some way the range of documents which might be searched or seized or to attach conditions in that regard. Unlike the situation of the High Court described in *Hughes* with its inherent jurisdiction to review an order made *ex parte*, this is *not* true of the District Court whose jurisdiction is dependent on statute.

88. The existence of the remedy of a judicial review happened to provide an adequate substitute in the present case, but in many cases that will not be so, especially where the documents in question are in a readily accessible form. There is, accordingly, nothing in the section on which any type of double construction test could plausibly rest.

89. The section thus may be said to exhibit structural weaknesses in terms of protecting the substantive right to journalistic privilege, fair procedures and the overall proportionality of the measure in much the same way as the general lack of safeguards attending the *ex parte* nature of the orders provided for by s. 3 of the Domestic Violence Act 1996 led a finding

that this section was unconstitutional by this Court in *DK v. Crowley* [2002] IESC 66, [2002] 2 IR 744.

90. Much the same can be said in terms of the compatibility of this section with the requirements of Article 10 ECHR. The same critical analysis to which the ECtHR directed the Dutch law at issue in *Sanoma Uitgevers* can equally be directed at the provisions of s. 10 of the 1997 Act. In both cases it comes down to the fact that the laws in question permitted – indeed, expressly allowed – the making of intrusive orders which had the potential to undermine the capacity of journalists effectively to raise in a timely fashion the defence of journalistic privilege before an independent judicial or similar body in respect of the material the subject of the search and seizure order. Putting this another way, s. 10 of the 1997 Act does not contain the type of safeguards which enabled the Latvian law at issue in *Nagla* to survive a systemic-Article 10 ECHR challenge.

91. These deficiencies are inherent in the section itself. In terms of the 2003 Act, the s. 3 obligation to comply with the substantive provisions of the ECHR does not, of course, apply to the District Court precisely because it is not an "organ of state' for the purposes of this section. The District Court is instead obliged by s. 2 of the 2003 Act to interpret s. 10 in a manner compatible with the State's ECHR obligations where this is possible without doing violence to the actual language of the statute. It seems to me – and this, in a sense, is where I respectfully part company with the reasoning of both Simons J. in the High Court and that of Costello J. in the Court of Appeal, both of whom seemed to think that, so to speak, ECHR-compatibility could be grafted onto the section by judicial decision – that these structural deficiencies are caused by omissions in the section which lie beyond the capacity of the courts to amend or cure. Just as I have already said in relation to the double construction rule in a constitutional context, to that extent it is hard to discern any s. 2-style interpretation of s. 10 of the 1997 Act which could or would address these problems.

92. Summing up, therefore, on this point I consider that urgent legislative action on the part of the Oireachtas is necessary to address the systemic problems with s. 10 of the 1997 Act which this case has highlighted in such a stark and illuminating fashion. While any such legislation will, of course, be entirely a matter for the Oireachtas, urgent action is immediately needed to shore up the section, from a finding of ECHR-incompatibility in a case involving a claim of journalistic privilege (but *only* in such a case) and, I would add, for that matter, probably from constitutional challenge on this specific ground as well, even if this constitutional issue must also await a fuller argument and debate. (Section 10 is, of course capable of working perfectly well in the vast majority of cases where the issue of privilege simply does not arise.) This could be done by, for example, giving the District Judge the power to attach conditions to the search warrant, together with powers to preserve the status quo and, in particular, to give that Court power to review and adjudicate upon a claim for journalistic privilege once that privilege is asserted for legitimate journalistic purposes by a *bona fide* journalist.

93. Given that any judicial adjudication on the privilege issue is likely to present often difficult competing rights and interests – not least the intrusion into the "virtual space" of both the journalist and his or her sources – a more nuanced and detailed statutory search provision may well be called for where journalistic privilege is asserted. One might also here draw attention to s. 48(5) of the Criminal Justice (Fraud and Theft Offences) Act 2001 which expressly enables authorised members of An Garda Siochana to insist on having access to a computer (including the obligation to provide passwords).

The search warrants of 2nd April 2019

94. It remains to consider the actual terms of the warrants themselves. In the Court of Appeal Costello J. did not find it necessary [at 153] to adjudicate on whether the powers conferred

by s. 10 of the 1997 Act involve the exercise of the judicial power of the State. I agree with her that on the facts of this case it is unnecessary to express any concluded view on this question.

95. One way or the other, it is clear that the object of ensuring that s. 10 applications were made to a District Judge was to ensure that an independent judgment should be brought to bear in respect of such applications for a search warrant. The importance of this was particularly acute in the present case given that the Gardaí sought access to the mobile telephone of a journalist. It was not, of course, sought by the Gardaí as a thing in itself: there was no suggestion, for example, that the mobile telephone was blood-splattered or that it had been used in the commission of a crime. Rather, access was sought in respect of the mobile telephone because it provided the pathway way to a virtual world where details of Mr. Corcoran's source(s) – and perhaps other information as well – could readily be obtained.

96. Given the ubiquitous presence of mobile devices in modern society, it is important to recall that this is technology which enables the person having access to learn almost everything about the owner, ranging from one's personal life, medical and financial records, personal interests, political views to knowledge about friends, acquaintances and other contacts. As Roberts C.J. observed in *Riley v. California* 573 US 373 (2014), at 401:

> "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life". The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought."

97. As Charleton J. noted in his judgment in *The People (Director of Public Prosecutions) v. Quirke* [2023] IESC 5, these comments of Roberts C.J. are just as true of Irish citizens in 2023. They are also, of course, particularly true of the mobile telephone of a journalist.

98. If this is so, then it is clear that the Oireachtas intended that the District Judge should, at least, in general terms, have all material information regarding the mobile telephone before him or her before the appropriate decision was made whether or not to issue the warrant. The fact that the owner of the mobile device was a journalist who had asserted journalist privilege was an absolutely critical detail, precisely because knowledge of this particular factor might well have caused the judge to refuse to issue the warrant for reasons I shall now seek to explain.

99. It is true that the present appeal has exposed clear weaknesses in the operability and general workability of s. 10 of the 1997 Act (a topic addressed elsewhere in this judgment). Yet even as it stands it would have been open to the District Judge to refuse to issue the warrant had these facts pertaining to the issue of journalistic privilege been disclosed to him. This is because the very grant of the warrant might well have amounted to a breach of Article 10 ECHR and, to my mind, Article 40.6.1° of the Constitution as well.

100. While it must be accepted that s. 10 of the 1997 Act does not expressly deal with this issue of journalistic privilege, I would nonetheless adopt and (if necessary) adapt the words of Henchy J. in *McMahon v. Leahy* [1984] IR 525. In that case this Court held that what it considered to be the unequal treatment of certain defendants in respect of whom extradition to Northern Ireland had been sought by the State authorities amounted to a breach of Article 40.1 of the Constitution. Henchy J. rejected the argument ([1984] IR 525, at 541) that the District Court had been nonetheless obliged to make the extradition order sought because the Extradition Act 1965 had not been provision for this situation:

> "…I would reject the submission…that where none of the statutory grounds of exemption from extradition is shown to apply, and the statutory requirements for extradition have been otherwise satisfied, a judicial order allow extradition must necessarily issue. To hold otherwise would be tantamount to saying that the Court's function in such circumstances is mechanical, directionless and without regard to the fact that its order will have an unconstitutional impact on the person to be extradited."

101. While these comments were made in the context of the presumption of constitutionality so far as it concerned the *operation* of a statute, they are nonetheless also apt so far as the Article 10 ECHR question is concerned (and, should the matter ever arise at some future stage, quite obviously so in the case of the Article 40.6.1° argument). It is true that the courts are not an "organ of the State" for the purposes of s. 1(1) of the 2003 Act. The Garda Commissioner is, however, such a personage. Section 3(1) of the 2003 Act provides that:

> "Subject to any statutory provisions (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

102. This means that unless such is plainly contraindicated by another statutory provision or by a common law rule, State bodies (including the Gardaí) must exercise their functions in a manner compatible with the State's ECHR obligations. Using the language of Henchy J. in *McMahon*, one might say that the Oireachtas could never have intended that the exercise of the s. 10 power was to be mechanical or directionless or that the District Court could not have had regard to the fact that its order will have the effect (or potentially might have the effect) of infringing Article 10 ECHR or (I would add) Article 40.6.1°. Here one might note that the language of s. 10 of the 1997 Act underscores all of this in that it provides that the District Judge "may" issue the warrant in question.

103. In this instance the judge's task was accordingly to make an independent assessment of whether or not to grant the warrant based on the evidence contained in the two informations. As cases such as *Damache* (in relation to the dwelling) and *CRH* (in relation to business premises) clearly show, an independent assessment is properly regarded by the Oireachtas as a key safeguard prior to the issue of any s. 10 warrant. This judicial discretion cannot, however, be exercised in a meaningful fashion unless the judge called upon to do so stands possessed of all the relevant materials pertinent to the exercise of that discretion where this might breach the State's Article 10 ECHR obligations (or, as may arise in some future case, which might otherwise have an unconstitutional impact on the journalist's right to privilege).

104. In this regard I would respectfully part company with the Court of Appeal insofar as Costello J. seemed to envisage a wide-ranging duty of disclosure on the part of the Gardaí who applied for the s. 10 warrant. It is important to stress that given the limitations of the section it is only where the subject-matter of the search has rights which are directly relevant to the search that the District Judge must be informed of the facts supporting that right. This disclosure obligation is driven by the specifics of journalism, not the generality of searching. As the European Court has frequently stressed in cases such as *Goodwin, Stichting Ostade Bladet* and *Nagla*, journalistic privilege is not just interfered with were a search warrant to be granted. In many cases the privilege will be wholly undermined – if not, indeed, destroyed — if documents are read on foot of a court order. When this happens the public's faith in the integrity of the journalist and the media outlet in question – and perhaps even the media at large — is severely tested. The consequences for press freedom are thus particularly serious and there is no real remedy.

105. Viewed objectively, the informations which were sworn in this particular case simply did not do this in that they omitted to record that Mr. Corcoran had already been interviewed

under caution over three months previously and that he had declined to identify his sources or to allow his mobile telephone to be accessed by the Gardaí, citing journalistic privilege for this purpose. In view of the circumstances of this case, this was a highly material fact of which, again viewed objectively, the District Judge ought to have been made aware. Given, moreover, that the interview with Gardaí had taken place on 19th December 2018 (i.e., over three months previously) this application cannot be said to have been made in circumstances of emergency or urgency in respect of which, perhaps, a more lenient and accommodating view might be taken.

106. Admittedly, had he made so aware of what had been said at the interview, the judge would immediately have been faced with what I might describe as the structural problems presented by s. 10 of the 1997 Act which I have already discussed. If such an application were to re-occur, then, in the absence of new amending legislation which cured these problems by addressing the privilege question, any District Judge confronting this question would be faced with an almost impossible dilemma since, as Simons J. noted in his judgment in the High Court, there is currently no real practical way of adjudicating on the privilege issue and such would not be allowed for by the section.

107. All of this, however, is for the future. So far as the present case is concerned it is clear that the s. 10 warrant ought to be quashed and set aside simply by reason of the objective failure of the grounding informations to disclose a highly material fact, namely, the fact that journalistic privilege had already been claimed by the journalist in question. This in turns means that, again viewed objectively, the s. 10 discretion was not exercised in a reasonable fashion (in the legal sense of that term), precisely because the judge did not have available to him the full panoply of relevant facts and was thus unable to reach a considered view based on a review of all material facts. As I have pointed out, had the judge been aware of this, he would have been entitled to refuse to make the order sought.

Part VII - Conclusions

108. In conclusion, therefore, I would affirm the decision of the Court of Appeal to quash the search warrants issued on 2nd April 2019 on the basis that, viewed objectively, the failure of the two informations grounding the application for a s. 10 warrant to state that Mr. Corcoran had already been interviewed under caution and that he had asserted journalistic privilege in respect of the material sought by Gardai meant that highly relevant information was not before the District Court. It is at least implicit in s. 10 of the 1997 Act that the District Judge cannot properly exercise the independent adjudicatory function which the Oireachtas intended as a necessary safeguard unless he or she stands possessed of all relevant facts where an objective failure to do so might result in a breach of s. 2 or s. 3 of the 2003 Act. (This may well also be true – as I personally believe it to be — of Article 40.6.1° of the Constitution, but the final resolution of the constitutional issue must await a future case.).

109. In those circumstances I consider that, again viewed objectively, the exercise of the s. 10 power was not exercised reasonably (in the legal sense of that term) in the present case, precisely because not all relevant and material information was before the Court relevant to the operation of ss. 2 and 3 of the 2003 Act (or, I would add, Article 40.6.1° of the Constitution) when it made the orders in question. It is on that basis that I consider that the warrants should be quashed by the grant of certiorari in both cases.

110. Over and above this, these proceedings have exposed serious shortcomings in s. 10 of the 1997 Act, in terms of the State's Article 10 ECHR obligations (and, I would add, Article 40.6.1° of the Constitution as well). Where I respectfully differ from the Court of Appeal (and, for that matter, the High Court) is that I consider that these shortcomings stand beyond the capacity of the courts to amend or cure and can only be addressed by the Oireachtas.

111. The right (subject, of course, to exceptions) of the media to protect their sources is a key feature of Article 10 ECHR press freedom as declared by the European Court of Human Rights in its case-law from *Goodwin* onwards.

112. I also take the view that without such protections the press cannot realistically be expected to discharge their functions of educating public opinion and holding the Government to account in the manner expressly provided for by Article 40.6.1°, although I should also stress that this issue was not fully argued in the appeal before us and, accordingly, I do not base my decision on this ground. To that extent, my comments on the constitutional issue may be regarded as in the nature of *obiter* comments not, perhaps, strictly necessary to the disposition of the appeal.

113. The lack of safeguards in the section designed to protect journalistic privilege and to provide for an independent, merits-based assessment of such a claim are particularly problematic. In any assessment of whether that claim was entitled to be upheld, regard would have to be had to the source of the information at issue in the present case and decisions such as that of the ECtHR in *Stichting Ostade Blade*.

114. The same applies, *mutatis mutandis*, to the question of the compatibility of s. 10 with Article 10 ECHR, again by reason not so much of what the section contains, but rather what it does *not* contain. Here again the European Court of Human Rights has spelled this out in stark terms in a series of cases, ranging from *Goodwin*, *Sanoma* to *Nagla*.

115. As I have already indicated, these are all matters to which the Oireachtas may wish to give urgent consideration. For the moment, however, it suffices to hold that the search warrants at issue in the present case should be quashed and that the Garda Commissioner's appeal from the decision of the Court of Appeal should be dismissed.