# AN CHÚIRT UACHTARACH

# THE SUPREME COURT

S:AP:IE:2022:000077

**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**

**Appellants**

**-and-**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**Respondents**

**Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 22nd day of June, 2023.**

**1.** I have read the judgments which Hogan J. and Collins J. will deliver in this matter, and I agree with them that the appeal should be dismissed, and the warrants issued on 2 April, 2019 should be quashed for the reasons set out in their respective judgments. It is, as I understand it, well established, not least by the decision of this Court in *Mahon and ors v. Keena & Kennedy* [2009] IESC 78, [2010] 1 I.R. 336 ("*Mahon v. Keena*"), that the right of journalists to protect the identity of confidential sources, while subject to exceptions, is protected by Article 10 of the European Convention on Human Rights ("ECHR"), and accordingly, by Irish law, pursuant to the European Convention on Human Rights Act, 2003 ("the 2003 Act"). It follows, therefore, that the fact that the subject of the warrant was a journalist, and a journalist's office, and that the execution of a warrant could therefore disclose, not merely the identity of a source of a particular story, but might also necessarily reveal the identity of other sources of no relevance to the Garda investigation was a matter which ought to have been communicated to the judge before the grant of a warrant.

**2.** Section 10 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 is, as my colleagues observe, framed in very blunt terms. However, a judge before whom an application is made for a warrant retains the possibility of granting or refusing it. Therefore, the fact that the warrant would necessarily trench upon a journalist's ability to maintain confidentiality could have been a ground upon which a judge exercised the option of refusing to grant a warrant. It follows that these facts were material facts which ought to have been brought to the attention

of the judge before any warrant was granted, and a failure to do so means the warrants must be quashed.

**3.** The judgments of Hogan and Collins JJ. also contain an extensive, and in my view, very valuable discussion of the extent to which the Article 40.6.1.i guarantee of freedom of expression provides that similar or comparable level of protection for journalists, however defined, seeking to protect the identity of sources of stories to that which has been held by the European Court of Human Rights ("ECtHR") to be provided by Article 10 of the ECHR. It can certainly be said that interpretation of the freedom of expression guaranteed by Article 40.6.1.i, particularly in relation to freedom of the press, has been relatively underdeveloped in this jurisdiction, and both judgments are, therefore, a useful corrective in that respect and provide helpful comparative material, and thought-provoking analysis.

**4.** As both judgments acknowledge, the question was not however, debated to any extent in the appeal, and does not appear to have been the subject of any detailed argument in the High Court or Court of Appeal. While it is clear that, after *Mahon v. Keena*, and indeed, this decision itself, the existing applicable law in Ireland already provides a reasonably detailed and relatively clear code, particularly with reference to the issue of the confidentiality of sources and particularly when understood against the background of a developed jurisprudence of the ECtHR on that issue. It is, nevertheless, certainly conceivable that the question of the interpretation of Article 40.6.1.i could become decisive in particular cases, such as, for example, a challenge to the validity of legislation or where the issue arose in circumstances where, for whatever reason, the provisions of the 2003 Act did not apply. In any event, it

is desirable that there should be clarity on the question of the constitutional guarantee more generally.

**5.** While, therefore, I acknowledge the benefit that is achieved by the comprehensive discussion of this issue in the judgments to be delivered today, and consider that they represent both a considerable advance on the discussion in this area to date, and an invaluable resource for further analysis, I believe, as indeed, I think all my colleagues do, that the final resolution of these issues should not be resolved until they arise in an issue which makes it necessary to do so, against the background of concrete facts and fully reasoned and informed argument. This applies particularly to the issue of whether Article 40.6.1.i provides a constitutional privilege for journalists and if so whether it is lesser or greater than, or simply different from, that provided under Article 10 of the ECHR, and in any event, the extent to which any such privilege might be subject to the same or different exceptions. Consequently, I do not wish to now express any view (even preliminary), on the issues discussed and would instead wish to expressly reserve my position on them.

*Unapproved*
*No redaction required*

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**[2023] IESC 15**

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**BETWEEN**

**EMMETT CORCORAN AND ONCOR VENTURES LIMITED**

**TRADING AS THE DEMOCRAT**

*Applicants*

**AND**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

*Respondents*

**JUDGMENT of Mr. Justice Maurice Collins delivered on 22 June 2023**

## BACKGROUND

1. I agree with Hogan J that the search warrants issued on 2 April 2019 ("*the Search Warrants*") should be quashed and the Respondents' appeal dismissed.

2. I also agree with Hogan J that these proceedings highlight significant deficiencies in section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as substituted by section 6(1)(a) of the Criminal Justice Act 2006) (hereafter "*Section 10*" and the "*1997 Act*") that require the attention of the Oireachtas.

3. The material facts are set out by Hogan J and so it is unnecessary to recite them at any length. As he says, the events at Falsk, Strokestown, County Roscommon in the early hours of 16 December 2018 were "*very disturbing*", amounting to a violent attack on the rule of law, calculated to terrorize both the immediate victims and the wider community and involving the commission of very serious criminal offences, against both persons and property. That being so, the Gardaí were duty bound to take all appropriate measures to identify and prosecute the perpetrators.

4. On his own account, Mr Corcoran was present "*at the aftermath*" of what he refers to as "*an incident at a house in which a number of vehicles were set on fire*". He travelled there, in his own car, "*as a consequence of "tip offs" from confidential journalistic sources*", the identity of which, he says, he is not "*entitled to reveal.*" It is not clear whether Mr Corcoran gave, or was asked to give, any assurance of confidentiality to those sources. Equally, it is not clear what information, beyond the timing and location

of the "*incident*", was given to Mr. Corcoran. In any event, he travelled to the scene and while there he took photographs and video footage which were subsequently uploaded to the website of *The Democrat*. That, it appears, was the entire purpose of the arrangement: Mr. Corcoran's "*sources*" wished to generate publicity for the unlawful actions carried out at Strokestown, presumably in the hope that such publicity would amplify the intimidatory impact of those actions.

5. These are, it might be thought, unpromising circumstances in which to assert a claim to "*journalistic privilege*", in the form of an entitlement on the part of Mr. Corcoran not to be compelled to identify those "*sources*".[1] After all, the case-law on Article 10 ECHR, while emphasising that the protection of journalistic sources is "*one of the cornerstones of freedom of the press*", also indicates that such protection does not extend uniformly to all sources in all circumstances: see Application no 40485/02 *Nordisk Film & TV A/S v Denmark* and Application no 8406/06 *Stichting Ostade Blade v Netherlands*. As the ECtHR stated in *Stichting Ostade Blade*, not every individual who provides information to a journalist is a "*source*" in the sense in which that term is used in the Article 10 case-law (para 62). The full protection of Article 10 arises in respect of "*sources in the traditional sense*", one "*who volunteers to assist the press in informing the public about matters of public interest*" (paras 63 & 64). The same level

[1] Carolan, "Protecting Public Interest Reporting: What is the Future of Journalistic Privilege in Ireland", 57 *The Irish Jurist* 187 (2017) ("*Carolan 2017*") observes that, in the most common scenario, "*journalistic privilege*" is invoked for the purpose of relieving an individual of a legal obligation to provide information to which they would otherwise be liable, thus operating as an immunity or exemption (at 189). Accordingly, he characterises it as a "*disclosure exemption*". That is the sense in which the language of "*journalistic privilege*" has been deployed in these proceedings. For reasons of convenience, and because it is the term generally used in the authorities, I shall refer to "*journalistic privilege*" in this judgment.

of protection is not available where the "*source*" is not "*motivated by the desire to provide information which the public were entitled to know.*"

6. The facts of *Stichting Ostade Blade* usefully illustrate this distinction. The applicant published a fortnightly magazine. Following a number of bombings in the Netherlands, the applicant issued a press release announcing that its next issue (to be published the following day) would include a letter from a group (the ELF) claiming responsibility for the bombing campaign. The following day, the magazine's offices were searched on foot of a search warrant for the purpose of obtaining the ELF letter. A large volume of material, including a number of computers, were taken by the authorities but subsequently returned. A challenge to the search in the Netherlands courts was unsuccessful and the applicant made a complaint under the ECHR. The ECtHR was not persuaded that "*source protection*" was at issue. The informant was not motivated by a desire to provide information which the public was entitled to know. On the contrary, he was claiming responsibility for crimes which he had himself committed and "*his purpose in seeking publicity through the magazine … was to don the veil of anonymity with a view to evading his own criminal accountability*" (para 65). While it did not follow that the applicant newspaper was left without protection under Article 10 ECHR – an order directed to a journalist to hand over original material could still have a "*chilling effect*" on the exercise of journalistic freedom of expression – the degree of protection did not necessarily reach the same level as that afforded to journalists when it comes to their right to keep their "*sources*" confidential because "*the latter protection is twofold, relating not only to the journalist, but also and in particular to the "source" who volunteers to assist the press in informing the public about matters of public*

*interest*" (para 64). On the facts in *Stichting Ostade Blade*, the court considered that the search pursued the legitimate aim of the prevention of crime and was necessary in democratic society given that the document sought could possibly assist in the identification of the person or persons suspected of carrying out dangerous criminal offences. In the circumstances, the applicant's complaint was rejected as manifestly ill-founded.

7. The observations of the ECtHR in *Stichting Ostade Blade* have an obvious resonance here and it may well be that, as a matter of principle, a compelling case can be made that Mr Corcoran's claim to "*journalistic privilege*", whether derived from Article 10 ECHR or otherwise, must in the circumstances here yield to the compelling public interest in the effective investigation of the events of the 16 December 2018, such that Mr. Corcoran might properly be compelled to identify the "*sources*" that led him to be present at the scene.

8. That was, indeed, the view taken by Simons J in the High Court: paras 90 – 102 (no constitutional source protection in the circumstances here) and paras 103 – 116 (no source protection under Article 10 ECHR either). A difficulty with the High Court's decision is that, in the name of judicially reviewing the Search Warrants, the Court undertook an exercise that, on its own analysis, it was not open to the District Judge to carry out under Section 10. Furthermore, having evidently found that the Search Warrants were properly issued, and dismissing the application for judicial review on that basis, it is not entirely clear what jurisdiction the High Court had to make the Order of 4 January 2021.

9. Furthermore, and fundamentally, in common with Hogan J and with the Court of Appeal, I differ from the High Court Judge as to the proper scope of the District Judge's functions and duties under Section 10. The Search Warrants here were issued without any evident regard to Mr Corcoran's status as an active journalist or any consideration of the fact that execution of the Search Warrants would potentially result not just in the disclosure of the identity of the sources that led Mr Corcoran to attend at Strokestown on the night of 16 December 2018 but of other sources, and other journalistic material, relating to Mr Corcoran's activities as a journalist which were unrelated to that incident. In my opinion, these *were* matters to which the judge could – and should – have had regard in determining whether or not to grant the Search Warrants. They were matters which ought to have been – but were not – specifically drawn to the judge's notice by the Gardaí involved. That omission is, in my view, fatal to the validity of the Search Warrants here.

## SECTION 10 OF THE 1997 ACT

10. Section 10 is set out in the judgment of Hogan J. The section was the subject of close examination in the recent decision of this Court in *People (DPP) v Quirke* [2023] IESC 5 (per Charleton J; O' Donnell CJ. Dunne, O' Malley, Baker, Woulfe & Murray JJ concurring). As Charleton J noted in his judgment, Section 10 does not make any reference to the searching of computers or mobile phones (in contrast to many other search warrant provisions on the statute-book) and does not include any of the ancillary/consequential provisions that have also been provided for by statute, including the power to require the provision of any passwords necessary to gain access to and/or to operate such computers or phones. Section 48 of the Criminal Justice (Theft and Fraud Offences) Act 2001, which is referred to in *Quirke*, provides an example of such a provision. Similar provisions may be found (*inter alia*) in section 14 of the Criminal Assets Bureau Act 1996 (as amended), section 908C of the Taxes Consolidation Act 1997 (as amended) and section 17A of the Sea-Fisheries and Maritime Jurisdiction Act 2006 (as amended).

11. For the reasons explained by Charleton J in *Quirke*, the search of a personal computer or phone may intrude upon privacy interests to a more significant extent than the search of a physical location, even of a dwelling-house: at para 73 and following, citing (*inter alia*) *R v Vu* [2013] SCC 60, [2013] 3 SCR 657 and *R v Fearon* [2014] SCC 77, [2014] 3 SCR 621 (decisions of the Supreme Court of Canada), *Riley v California* 573 US 373 (2014) (a decision of the United States Supreme Court) and *Dotcom v Attorney General* [2014] NZSC 199 (a decision of the Supreme Court of New Zealand). The absence

from Section 10 of any requirement for the specific authorisation of such a search is wholly unsatisfactory.

12. There is, of course, a further and significant omission from Section 10, namely the absence of any reference to the position of privileged or protected material. Items "*subject to legal privilege*" are excluded from seizure under section 48 of the Criminal Justice (Theft and Fraud Offences) Act 2001. Other search and seizure provisions, such as section 9 of the Criminal Law Act 1976 and section 17A of the Sea-Fisheries and Maritime Jurisdiction Act 2007, have similar exclusions. Section 15 of the Criminal Justice Act 2011 (which empowers judges of the District Court to make orders for the production of documents and/or the provision of information for the purposes of the investigation of certain offences relation to banking, fund investment and other financial activities) also excludes any right to production of, or access to, any document subject to legal professional privilege. Similarly, section 33 of the Competition and Consumer Protection Act 2014 excludes the compelled disclosure of legally privileged material (and also provides a procedure for determining disputes as to the existence or scope of the privilege while preserving the confidentiality of the material).

13. Section 10 is similarly silent as to the position of material held by journalists. In fact, the statute-book generally is mute on that issue. That is so notwithstanding many decades of Strasbourg case-law – going back to, and beyond, *Goodwin v United Kingdom* (1996) 22 EHRR 123 – from which it is evident that the compulsory disclosure of such material raises significant issues requiring specific assessment within the framework of Article 10 ECHR. In stark contrast to the position in this jurisdiction,

provisions have been in place in England and Wales since the enactment of the Police and Criminal Evidence Act 1984 ("*PACE*") restricting access to "*journalistic material*" (as defined) – and also to legally privileged material – on foot of an order or search warrant. Specific access conditions must be satisfied before an order may issue authorizing the obtaining of such material and, in general, an application for such an order for such material must be made *inter partes*: PACE, sections 8-16 and Schedule 1 (Special Procedures). There is also a qualified statutory protection against the disclosure of sources in the United Kingdom, in the form of section 10 of the Contempt of Court Act 1981, which has no counterpart in this jurisdiction.[2] The provisions of PACE apply in Northern Ireland by virtue of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("*the PACE Order*") and it was considered by the High Court of Justice of Northern Ireland in *Fine Point Films and Birney* [2020] NIQB 55 to which extensive reference was made by Costello J in her judgment in the Court of Appeal (Donnelly and Murray JJ agreeing) and which I also discuss below.[3]

14. Section 10 has some other notable features. A warrant issued under the section operates to authorise a named Garda to enter the place named in the warrant – if necessary, by force – to search that place and any persons found at it and "*to seize <u>anything</u> at that place … that the member reasonably believes to be evidence of, or relating to, the*

[2] Section 10 provides that "*No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.*"

[3] *Fine Point Films and Birney* appears to have been a decision of the NI High Court rather than of the Court of Appeal but given that the Court was a divisional court presided over by Morgan LCJ and including also Treacy LJ and Keegan J (as she then was), that hardly diminishes its persuasive authority.

*commission of <u>an arrestable offence</u>*" (my emphasis). That extends to anything that is reasonably believed to be evidence of, or relating to, the commission of a different arrestable offence(s) to the offence(s) identified in the Information. There is nothing in Section 10 to suggest that the judge has power to restrict the scope of a warrant issued under the section, such as by authorising only the seizure of specified items or categories of items. Again, that appears to differ from the position under PACE (see PACE, section 8(2)). Nor is there anything in Section 10 that appears to permit the judge to attach conditions to a warrant, such as a condition prohibiting access to journalistic material or deferring access to it, so as to allow the issue of access to be litigated. Section 10 itself does not appear to permit a judge to review a warrant that has been issued or to hear objections to it, whether at the time of the application for it or *post hoc.*

15. Even so, a judge asked to issue a Section 10 warrant is far from being a cipher or rubber-stamp. The importance of their function as an independent and impartial decision-maker is emphasised by this Court's decision in *Damache v DPP* [2012] IESC 11, [2012] 2 IR 266 and its recent decisions in *People (DPP) v Behan* [2022] IESC 23 and in *Quirke.*

16. In *Damache*, the Court struck down section 29(1) of the Offences Against the State Act 1939 (as inserted by section 5 of the Criminal Law Act 1939) precisely because it permitted a search warrant for a building or place, including a dwelling, to be issued by a Senior Garda Officer who was not independent of the investigation. Speaking for the Court, Denham CJ expressly accepted that the issuing of a search warrant was an

administrative act, that did not constitute the administration of justice and which therefore did not have to be done by a judge (though it was a function required to be exercised judicially) (at para 34). She cited with approval the observations of Keane J in *Simple Imports Ltd. v Revenue Commissioners* [2000] 2 IR 243 (at page 251), which concerned a challenge to the validity of search warrants issued by District Judges under various Customs statutes, to the effect that the judge was "*no doubt performing a purely ministerial act in issuing the warrant*", in that he or she did not "*purport to adjudicate on any lis in issuing the warrant*".[4] But whether the power to issue a warrant was vested in a judge or in some other person, that person had to be independent and the process had to be "*meaningful*", which in this context meant that it was:

> "*.. necessary for the person authorising the search to be able to assess the conflicting interests of the State and the individual in an impartial manner. Thus, the person should be independent of the issue and act judicially. Also, there should be reasonable grounds established that an offence has been committed and that there may be evidence to be found at the place of the search*" (at para 51).

[4] A similar view has been taken in Australia: see the decision of the High Court of Australia in *Grollo v Commissioner of Australian Federal Police* 131 ALR 225, per Brennan CJ, Deane, Dawson and Toohey JJ at 230-231, noting (*inter alia*) that while the power to issue a warrant (in that case a warrant authorising the interception of a mobile telephone service) had to be exercised judicially that meant only "*that the power must be exercised without bias and fairly weighing the competing considerations of privacy and private property on the one hand and law enforcement on the other*."

17. Although the Court in *Damache* did not go so far as to hold that the power to issue a search warrant must be vested in a judge, it nevertheless quoted with apparent approval a passage from the Report of the *Morris Tribunal* which recommended that the power to issue a warrant under section 29 should be vested in a judge:

> "*The judge can then make an independent decision. Such a decision as to whether to grant the warrant would involve a balancing of the interests of An Garda Síochána and the investigation of the criminal offence and the constitutional or legal rights of the person whose premises is to be the subject of the warrant. There are very limited occasions upon which time would be so pressing as to make it impossible to follow such a procedure. In any event, a residual power for such eventuality could, perhaps, still be vested in a senior officer of the Garda Síochána to be used in exceptional circumstances.*"

18. In response to *Damache*, the Oireachtas enacted the Criminal Justice (Search Warrants) Act 2012. Section 1 of that Act re-enacted section 29 of the Offences of the State Act 1939 in significantly modified form. The power to issue warrants under the section is now vested in a judge of the District Court. However, a member of the Gardaí not below the rank of Superintendent may issue a warrant in circumstances of urgency, provided that such member "*is independent of the investigation*" (section 29(5)). That requirement was the focus of *Behan*, in which the majority of the Court (per O' Malley J; Dunne and Baker JJ agreeing) gave a strict construction to section 29(5), on the basis that the section was intended to respect the *nemo iudex in causa sua* principle (at para 64).

19. *Quirke* was concerned directly with Section 10. Charleton J's judgment discusses the common law authorities on the power to search, which emphasise "*the intervention of a judicial mind; the need for a statutory power; the conformance with the parameters of such power; the need to specify what is in reality sought; and the duty to use a power only for the purpose for which it is granted by statute. Such an approach is necessary to ensure that the manner in which a warrant is obtained, a significant but proportionate and necessary infringement on privacy rights, remains a legitimate balancing exercise carried out by the issuing judge*" (at para 89).

20. The difficulty in *Quirke* was that, while a warrant had been sought and obtained under Section 10 authorising the search of the suspect's home, the issuing judge was not told that the Gardaí wished to examine a computer located there. The Court took the view that the lawful seizure of a computer (or a device such as a mobile phone) required express judicial authorisation in accordance with *Damache* because the seizure of such a device for the purpose of searching through its "*contents*" (as opposed to examining it for the presence of physical evidence such as fingerprints or DNA material) "*involves the automatic loss of privacy rights on a vast scale*" and "*[w]ithout judicial scrutiny, seizure for the purpose of a non-physical search into mobile phones and other computer devices of vast memory and carrying the private dimensions of a human life over years or months no balancing of rights can be undertaken whereby a court may authorise such a search and seizure.*" (para 97). It follows that where the Gardaí wish to seize a computer on foot of a Section 10 warrant, that "*must be brought to the judge's attention on applying for legal authority to authorise such an invasion of privacy*" (para 101)

21. In the circumstances, the Court in *Quirke* held that, while the warrant was valid and the search lawful, the seizure of the computer was unauthorised.

22. Accordingly, a judge asked to issue a warrant under Section 10 is obliged to scrutinize the application rigorously and assess it independently and impartially. That is the essential rationale of entrusting the function to an independent judge in the first place. That function cannot properly be discharged unless the applicant for the warrant ensures that all material information is before the judge. That was the issue in *Quirke*. If the judge is not satisfied that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in the place that is sought to be searched, the warrant *must* be refused. But even where the judge is satisfied that that statutory threshold is met, it *may* still be appropriate to refuse to issue the warrant. That follows clearly from the language of Section 10 (providing as it does that, if satisfied that there are reasonable grounds for suspicion, "*the judge <u>may</u> issue a warrant*" (my emphasis)) but that position is in any event strongly reinforced by the constitutional imperative for an independent decision maker who must consider whether the issue of a search warrant under Section 10 appears to be a proportionate and necessary infringement of the rights of the intended subject(s) of the search. If not, the warrant *must* be refused. Any assessment of proportionality in this context necessarily involves consideration of whether some less intrusive measure might be sufficient to protect the interests of the State.

## THE SEARCH WARRANT APPLICATIONS HERE

23. Here, Mr Corcoran was interviewed under caution by the Gardaí on 19 December 2018 and made a statement in which he described himself as the editor and owner of the *Democrat* Newspaper. Asked whether he was a "*registered journalist*", Mr Corcoran indicated that he was a "*published journalist*" who had supplied copy to the national newspapers. Asked how he had heard about the fire on 16 December 2018, he indicated that, in order to protect his journalistic integrity, he would have to make no comment and, while stating that he was more than happy to assist, he could not compromise his journalistic integrity or his sources. He denied having anything to do with the events. Asked whether the video footage he had uploaded to Facebook and to the *Democrat* website was "*all the footage*" he had captured, he confirmed that it was. He declined to identify the "*device*" he used to upload the video footage. While he was not asked in explicit terms to hand over the "*device*", at this point in the interview his solicitor (who was also co-owner of *The Democrat*) intervened to state that it "*might compromise the source that brought his client to the site and therefore he is obviously declining to give information regarding it.*" Asked what he had done with the photos he had taken at the scene, Mr Corcoran again declined to comment but confirmed that he would be happy to provide copies of all such photos to the Gardaí. At the conclusion of the interview, Mr Corcoran emphasised that he did not know what had happened until he arrived at the scene and that any information that was in the subsequent article he had written was "*obtained subsequently from confidential sources*".

24. It appears that, on 20 December 2018, Mr Corcoran gave the Gardaí a USB stick containing video footage and photos recorded by him on the night of 16 December 2018.

25. A considerable period of time then elapsed. That is significant in itself, suggesting as it does that the Gardaí did not consider that there was any pressing urgency about obtaining access to Mr Corcoran's phone and/or other material in his possession. In any event, on 2 April 2019 – some 10 weeks after the incident – the Gardaí applied for the issue of the two Search Warrants pursuant to Section 10. The information sworn for each application was in substance identical. It referred to the incident on 16 December 2018, referred to the fact that footage of the "*immediate aftermath of the attack*" had been recorded by Mr Corcoran and explained that a USB drive had been voluntarily handed over to Gardaí by Mr Corcoran on 20 December 2018 which, on examination, indicated that the video footage had been downloaded from an iPhone 6 between 5.34 and 5.40 on 16 December 2018. The information referred to the posting of video footage on the Facebook page of the *Democrat* and on *Democrat*.ie and stated that articles published on both sites contained information that was not in the public domain and suggested that the author had been present at the scene (that, of course, was not in dispute). The information then recited that the informant believed that there were reasonable grounds to believe that Mr Corcoran had been present at the attack and "*I believe an iphone 6 and further video footage which may identify other suspects sought in the investigation may be found on an iphone 6 or other computer or media device applied for at Democrat.ie Newspaper … and the home of Emmet Corcoran at ….*".

26. There is no suggestion that any additional information was before the judge when he was asked to issue the Search Warrants. Therefore, we must proceed on the basis that the applications were made, and the Search Warrants granted, in reliance on the sworn information and not on any other basis.

27. I agree with Hogan J, and with the Court of Appeal, that, in the circumstances here, the sworn information was not adequate to enable the judge to discharge his functions under Section 10 properly. It failed to disclose clearly that Mr Corcoran was a working journalist and editor of the *Democrat* newspaper. It may be said that that could be gleaned, at least in part, from what was said in the information. In my view, however, it required to be brought specifically to the notice of the judge. The information failed to disclose that Mr Corcoran had given a voluntary interview to the Gardaí, during which he had accepted that he had been present at the scene of the incident. It failed to disclose that Mr Corcoran had voluntarily provided what he said was all of the footage and photos he had taken. That is particularly significant given that the thrust of the information seems to have been directed at the possibility that a search would yield further video footage. Notably, the information said nothing about examining Mr Corcoran's iPhone or other devices for the purpose of accessing call or message data or accessing his contacts. It also failed to disclose that Mr Corcoran had clearly indicated that he regarded the identity of his sources as confidential *and* that he was concerned that if the Gardaí had access to the "*device*" he had used to take the video footage and photos, that could compromise those sources.

28. That information was, in my view, clearly material to the question presented to the judge here, namely whether warrants should be granted under Section 10 for the search of Mr Corcoran's home, as well as of the offices of the *Democrat*. The grant of such warrants would manifestly engage Article 10 ECHR. The ECtHR has characterised such measures as "*drastic*": *Nagla v Latvia* (2013) (Application no. 73469/10), § 95. That characterisation appears wholly apt here given the breadth of the powers conferred by a Section 10 warrant once granted. Such a warrant is far more intrusive than an order directing the identification of a source, such as was at issue in *Goodwin*.[5]

29. Article 10 is not, as such, part of Irish law: *McD v L* [2009] IESC 81, [2010] 2 IR 199. But section 3 of the European Convention on Human Rights Act 2003 ("*the 2003 Act*") imposes a general duty on every "*organ of the State*" to "*perform its functions in a manner compatible with the State's obligations under the Convention provisions*" (which include Article 10). "*Organ of the State*" does not include "*a court*" (section 1(1) of the 2003 Act). But if, as *Simple Imports* and *Damache* suggest, a judge exercising the functions conferred by Section 10 is not exercising a judicial function – is not acting as "*a court*" but is acting as a designated person with appropriate independence and expertise – that exclusion would appear to have no application. It is

[5] A point also made by the ECtHR in *Roemen & Schmit v Luxembourg* (2003) (Application 51772/99) where the court noted that, even if unproductive, a search conducted with a view to uncover a journalist's source "*is a more drastic measure*" than an order to divulge the source's identity "*because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as by definition, they have access to all the documentation held by the journalist*" (para 57). That is certainly true of a search carried out under a warrant issued pursuant to Section 10 which in appropriate cases may also extend to electronic documentation/information capable of being accessed through computers or mobiles phones found during such a search.

not, however, necessary to decide that point. Even if a judge when acting pursuant to Section 10 is not an "*organ of the State*", and thus is not subject to the section 3 duty, it does not follow that he or she is mandated to disregard Article 10. An Garda Síochána is undoubtedly an "*organ of the State*" and is thus clearly within the scope of section 3. The Garda Síochána Act 2005 (as amended) also makes it clear respect for human rights is a fundamental principle of policing in the State.[6] Persons in the position of Mr Corcoran here are undoubtedly entitled to rely on Article 10 *vis a vis* the exercise by the Gardaí of their powers and functions and a judge assessing an application for a warrant under Section 10 must be able to have regard to it in appropriate cases. To suggest otherwise would be to suggest that Section 10 compels the issue of a search warrant even where a District Judge is satisfied that the execution of such a warrant would inevitably involve a breach of Article 10 by the Gardaí (and by the State). That is not the law as I conceive it.

30. In any event, the interpretative obligation imposed by section 2 of the 2003 Act clearly requires that Section 10 be interpreted as entitling a judge to have regard to Article 10 in exercising his or her functions under Section 10. That proposition follows inevitably from the terms of section 2 itself, as well as the ECtHR's Article 10 jurisprudence (of which judicial notice is to be taken by virtue of section 4 of the 2003 Act). This Court, like the High Court and the Court of Appeal, is duty bound to interpret Section 10 in a manner compatible with the ECHR: see this Court's decision in *Mahon v Keena* [2009]

[6] The provision of a policing service "*in a manner that respects human rights*" is one of the "*policing principles*" set out in section 3B of the Act (inserted by the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015)

IESC 64 and 78, [2010] 1 IR 336, to which further reference is made below. The interpretive obligation imposed by section 2 is not unlimited and does not permit the court to act as legislator: see the decision of this Court in *Ryan v Clare County Council* [2014] IESC 67, [2015] 1 ILRM 81, per McMenamin J (Laffoy and Dunne JJ) at para 55 as well as the decision of the High Court (McKechnie J) in *Foy v An tArd-Chláraitheoir* [2007] IEHC 470, [2012] 2 IR 1, at paras 75 – 76. Significant questions arise as to whether Section 10 is capable of being interpreted in a manner that would comply fully with the requirements of Article 10. But the immediate issue here is more straightforward: it is whether a judge exercising the functions conferred by Section 10 can, in that context, have regard to Article 10 and the interests protected by it. That appears to me to be the irreducible minimum if Section 10 is to be capable of operating in a manner compatible with the State's ECHR obligations. Of course, Section 10 makes no reference to Article 10. Equally, however, it makes no reference to the protection of the dwelling-house or to rights of privacy but it is clear that such interests must be taken into account where relevant in assessing whether to issue a search warrant (*Damache; Quirke*).

31. That Section 10 can and should be interpreted so as to enable – and, in appropriate circumstances, require – a judge to whom an application for a search warrant is made to have regard to Article 10 was not, as I understand it, contested at the hearing of the appeal. While disputing that Section 10 could properly be read as the Court of Appeal had read it (an issue to which I will return) Counsel for the Director accepted that, having regard to *Damache*, the judge here was entitled to have *some* regard to Article 10 and the protection afforded to journalistic material in considering whether it was

proportionate to issue a warrant. But irrespective of the stance taken by the Director, the legal position is, in my view, clear.

32. The difficulty here is that the material presented to the judge did not adequately disclose the position so as to enable him to make a properly informed assessment as to whether it was appropriate to issue the Search Warrants. At a minimum, the judge ought to have been told, in unambiguous terms, that Mr Corcoran was a journalist *and* that one of the purposes of the intended searches – if not indeed the principal purpose – was to identify Mr Corcoran's sources, which he had made clear were confidential and which he had made clear he felt unable to disclose because of his obligations as a journalist. These were clearly material considerations which required to be disclosed to the judge. If such disclosure had been made, the judge might nonetheless have proceeded to grant the Search Warrants (though whether, in that event, the Warrants would have been compatible with Article 10 is another matter). But that was not inevitable: the judge might instead have concluded that granting the Search Warrants would, in the particular circumstances, be disproportionate and/or incompatible with Article 10 ECHR, particularly in circumstances where the execution of the Search Warrants might result in the seizure of, and access being obtained to, journalistic material unconnected to the incident being investigated. The failure to disclose these essential matters to the judge is, of itself, fatal to the validity of the two Search Warrants in my view.

## THE DECISION OF THE COURT OF APPEAL

33. The Court of Appeal also held that the Search Warrants should be quashed. At para 154 of her judgment, Costello J summarised her conclusions as follows:

> "*It is open to a member of An Garda Síochána to apply in at least some circumstances ex parte to a District Court judge for a search warrant of a journalist's home or place of work under s. 10 of the 1997 Act provided that the minimum safeguards identified are observed. The District Court judge must be informed that the application engages or potentially engages journalistic privilege, that this privilege is protected by the Constitution and the Convention, that it may be overridden, 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. The applicant is under an obligation to make full disclosure in order that the District Court judge may properly balance the competing rights of the public interest in the investigation and prevention of crime and the rights of journalists, their sources and the general public in the protection of journalistic sources from disclosure. A warrant issued where these minimum requirements are not met may be quashed. A review and ex post facto balancing of the rights after a warrant has issued and after it has been executed is not compliant with the requirements of the Constitution. The very fact of the issuing of the warrant to search the home or place of business of a journalist, even if it is not executed or no journalistic*

*material is seized on foot of it, may in some circumstances amount to a breach of the rights of journalists, and their sources, under the Constitution. Accordingly, the warrant that issued in this case ought to be quashed*."

***Mahon v Keena***

34. The issue of whether "*journalistic privilege*" enjoys (or ought to enjoy) constitutional protection is discussed later in this judgment. As I shall explain, I do not consider it necessary or appropriate for the Court to decide that issue in this appeal. However, there is no question but that Article 10 ECHR applies and that Section 10 must, so far as is permissible, be interpreted in a manner compatible with it. For that purpose, the Court must take the Article 10 ECHR jurisprudence essentially as it finds it. As already mentioned, *Mahon v Keena* provides an illustration of the operation of the section 2 interpretative obligation in this context. It was the subject of close consideration by Costello J in her judgment. The proceedings in *Mahon v Keena* arose from an order made by the Planning Tribunal pursuant to section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 directing the defendants (both well-known journalists working for the *Irish Times*) to produce to it all documents relating to confidential Tribunal correspondence which had been leaked anonymously to them and which had been published in the *Irish Times*. The Tribunal wished to identify the source of the leak. The defendants informed the Tribunal that the document had been destroyed by them and declined to give any information that might assist in the identification of the source of the leak (while the document had been provided anonymously, the

defendants were in a position to confirm whether it appeared to be an original letter, on the letterhead of the Tribunal, or a copy, which – so the Tribunal suggested – could serve to narrow the potential sources and perhaps exclude the Tribunal itself as the source). The Tribunal then applied to the High Court pursuant to section 4 of the Tribunal of Inquiries (Evidence) (Amendment) Act 1997 for an order compelling the defendants to answer questions relating to the source of the leaked document. An order to that effect was made by the High Court but that order was set aside by this Court on appeal.

35. The Court (per Fennelly J; Murray CJ, Geoghegan, Macken and Finnegan JJ agreeing) upheld the conclusions of the High Court to the effect that the leaked document was confidential and that the Tribunal was competent to conduct an inquiry into the source of its unauthorized disclosure. The appeal therefore turned on the balance struck by the High Court between the power of the Tribunal to investigate and the right of the defendants to refuse to disclose any information about their sources (para 58). In that context, Fennelly J noted that the combined effect of sections 2 – 4 of the 2003 Act was that the relevant provisions of the Tribunals of Inquiry Acts had to be interpreted in a manner compatible with the State's obligations under the ECHR (para 65). He then considered some of the Article 10 jurisprudence, particularly *Lingens v Austria* (1986) 8 EHRR 407, *Fressoz and Roire v France* (2001) 31 EHRR 28 and *Goodwin*. He also considered the treatment of journalistic privilege in the United States, referring to the US Supreme Court's decision in *Branzburg v Hayes* (1972) 408 US 665, to which I refer later.

36. Referring to the judgment of the High Court, Fennelly J expressed his agreement with its view that the exercise of deciding between competing interests in a democratic society based on the rule of law is reserved to courts established by law. The courts "*cannot and should not abdicate their responsibility to decide when a journalist to disclose his or her source*" and "*cannot shirk their duty to penalize journalists who refuse to answer questions legitimately and lawfully put to them*" (para 91). In the event "*of a conflict, whether in a civil or criminal context, the courts must adjudicate and decide, while allowing all due respect to the principle of journalistic privilege*", with no citizen having "*the right to claim immunity from the processes of the law*" (para 92).

37. In Fennelly J's view, the High Court had erred in giving the weight it had to the fact that the defendants had deliberately destroyed the very document that was at the core of the inquiry. Furthermore, the benefit in making the order was "*speculative at best*" (para 98). Noting the Tribunal's submission that, where the source was anonymous, the relationship of trust and confidence between journalist and source which is the basis for the journalist's privilege was absent, Fennelly J observed that the ECtHR case law had not addressed the issue of whether the privilege was there to protect the source or the journalist.[7] Rather, it appeared to proceed on a "*functional theory: is there a pressing social need for the imposition of the restriction.*" (also at para 98).

[7] It appears from decisions such as *Nordisk Film & TV* and *Stichting Blade* that the Article 10 protection applies, in principle, to both journalist and source. That potentially gives rise to difficult issues as to who may waive the protection: see the discussion of these issues, in a US context, in Wimmer & Kiehl, "Who Owns the Journalist's Privilege – the Journalist or the Source?" (2011-2012) 28 *Communications Lawyer* 9-13. The question of "*whose privilege*" is also considered in Carolan, "*Protecting public interest reporting: what is the future of journalistic privilege in Irish law?*" 2017 Irish Jurist 187-200 ("*Carolan 2017*"), at 192-195.

38. Fennelly J expressed his ultimate conclusion thus:

> "*[100] According to the reasoning of the European Court in Goodwin v. The United Kingdom(1996) 22 E.H.R.R. 123, an order compelling the defendants to answer questions for the purpose of identifying their source could only be "justified by an overriding requirement in the public interest". Once the High Court had devalued the journalistic privilege so severely, the balance was clearly not properly struck. On the other side, I find it very difficult to discern any sufficiently clear benefit to the tribunal from any answers to the questions they wish to pose to justify the making of the order*."

39. As will be evident from the discussion above, the focus of this Court's analysis in *Mahon v Keena* was on the balancing exercise to be carried out by the High Court (and this Court on appeal) under section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997. That had been the focus of the High Court also. That is unsurprising. The order sought was an order under that section. The earlier order made by the Tribunal under section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 was not directly at issue. Both the High Court and this Court appeared to proceed on the basis that an order could properly be made under section 4 of the 1997 Act if, and only if, such an order would be compatible with Article 10 ECHR. The High Court considered that there was such a "*pressing social need*" to preserve public confidence in the Tribunal and as there was no other means by which that could be done other than by making the order sought by the Tribunal, such an order satisfied the

Article 10(2) threshold requirement of being "*necessary in a democratic society*" ([2007] IEHC 348, pages 36-37). This Court, in contrast, clearly concluded that there was no "*overriding requirement in the public interest*" capable of justifying the order sought. In other words, there was no "*pressing social need*" for imposing an obligation of disclosure on the defendants in the circumstances presented.

40. *Cornec v Morrice* [2012] IEHC 376, [2012] 1 IR 804, which was also referred to by the Court of Appeal in its judgment, was decided primarily by reference to the provisions of Article 40.6.1.i of the Constitution. I discuss that aspect of the decision in detail later. However, it is implicit in the judgment of Hogan J that, had it been necessary to do so, he would have interpreted the provisions of the Foreign Tribunals Evidence Act 1856 in a manner which rendered them compatible with Article 10 ECHR by reading section 5 of that Act (which provides that any person examined on foot of an order made under the Act has the same right to refuse to answer as they would have in domestic proceedings) as encompassing the Article 10 protection against compelled disclosure of a source: see at para 64.

***Fine Point Films and Birney***

41. Before returning to the Court of Appeal's analysis, I should refer to a further decision that significantly influenced its analysis, namely *Fine Point Films and Birney*. Fine Point Films was a well-known documentary film producer. Mr Birney, its CEO, had a significant track-record in documentary journalism. The third applicant, Mr McCaffrey, was an investigative journalist, also with a distinguished track-record, who was

employed by an online investigative news platform related to Fine Point Films. He was a member of the NUJ (that fact was significant in the Divisional Court's assessment). In 2017, after a lengthy investigation, Fine Point Films released a documentary about the murder of six men by the UVF at Loughinisland in 1994 and the subsequent RUC investigation. The documentary named 4 suspects that had been identified by the RUC after the attack. It also referred to sensitive documentary material relating to an investigation carried out by the Police Ombudsman into complaints that had been made to the Ombudsman as to the adequacy of the RUC investigation. Subsequently, an investigation by an external Police force was commissioned for the purpose of establishing how the production team obtained access to the Ombudsman material, whether by theft of the material or by some other unauthorised disclosure.

42. As already mentioned, the PACE Order governs access to "*journalistic material*" in Northern Ireland (other than under the Terrorism Act 2000). "*Journalistic material*" means "*material acquired or created for the purposes of journalism*" (Article 16). Where such material consists of documents or other records which are held in confidence (that is to say, subject to an express or implied undertaking to hold it in confidence or a restriction on disclosure or an obligation of secrecy contained in any statutory provision), then it is deemed to be "*excluded material*" for the purposes of PACE (Article 13). Otherwise, "*journalistic material*" is categorised as *"special procedure material*" (Article 15). Applications for access to "*excluded material*" and "*special procedure material*" must be made in accordance with Schedule 1 (Article 11). Schedule 1 sets out two sets of access conditions. Access to "*excluded material*" requires the second set of access conditions to be satisfied (access to "*special procedure*

*material*" can be permitted once either set of conditions is satisfied). The conditions governing access to "*excluded material*" are that (i) that there are reasonable grounds for believing that such material is at the specified premises; (ii) that but for Article 11(2), a search of such premises could have been authorised by the issue of a warrant under some other statutory provision and (iii) the issue of such a warrant "*would have been appropriate*". Applications for an order in respect of "*excluded material*" or "*special procedure material*" are made *inter partes* and once an application is served on a person, he or she must not conceal, destroy, alter or dispose of the material to which the application relates without leave of the court or the permission of the police until the application is determined. An order, if made, does not authorise a general search but rather requires the person in possession of the material to produce it to the police or allow them access to it.

43. That is the general position under the PACE Order. Exceptionally, however, provision is made for the issue of a search warrant *ex parte* in certain specified circumstances, Those circumstances include where the material sought is subject to a statutory restriction on disclosure and is likely to be disclosed in breach of such restriction in the event that a warrant is not issued or where service of notice of an application "*may seriously prejudice the investigation for the purpose of which the application is sought, or other investigations*".

44. The warrant at issue in *Fine Point Films and Birney* was issued *ex parte.* A transcript of the application was before the High Court and is referred to extensively in the

judgment. There is, of course, no transcript of the application here.[8] In any event, the application for a warrant was said to be justified because of a concern that if an application for a production order had been served, steps might have been taken to frustrate the securing of the Police Ombudsman material (which, it was suggested, had been stolen from the Ombudsman). That rationale – which was based entirely on the fact that Mr McCaffrey had declined to voluntarily provide the police with material about a source in an earlier investigation, in reliance on his obligations as a journalist under the NUJ Code of Practice – was the subject of scathing analysis by the court, as was the basis for seeking the warrant in the first place in terms of compliance with the applicable access conditions.[9] It is perfectly clear from the court's judgment that it was not persuaded that there was any proper basis for proceeding *ex parte.* Nevertheless, the court made important observations as to how the *ex parte* hearing ought properly to have proceeded. It was a fundamental principle that such a hearing should be fair (para 41). There was a "*heavy onus*" on those seeking to pursue *ex parte* proceedings to take all reasonable steps to ensure that they were fair and part of that obligation was that the applicant should put on "*a defence hat*" and bring to the judge's notice those matters that someone representing the defendant or interested party would rely on it if present (para 42).

[8] There seems to me to be considerable force to what was said in *R (Energy Financing Team Ltd) v Bow Street Court* [2006] 1 WLR 1316 as to the desirability of maintaining a record of such applications, at least where – as here – the application engages fundamental interests under Article 10 ECHR.

[9] At paras 48-52.

45. As for Article 10 ECHR, the court had earlier referred to *Goodwin* and *Roemen & Schmit v Luxembourg*. Although there had been some acknowledgement of the importance of journalists in a democratic society in the course of the *ex parte* hearing:

> " *the judge was not advised that Article 10 Convention rights were engaged, nor was he provided with any of the relevant jurisprudence nor was it made clear to him that a warrant such as this sought could only be justified by an overriding requirement in the public interest. This issue was absolutely fundamental to whether or not a warrant should be issued and the failure to address it means that we can have no confidence that the trial judge applied the right test.*"

46. The statutory context in which *Fine Point Films and Birney* was decided differs significantly from the statutory context here. There is no statutory equivalent in this jurisdiction to section 10 of the Contempt of Court Act 1981 or the PACE Order. That the Court of Appeal was alive to those differences is evident from the judgment of Costello J (at para 96). Nonetheless, she did not consider those differences to be material to the central holding in *Fine Point Films and Birney*, which she identified as "*the requirement that before an ex parte warrant of the kind in issue in these proceedings may issue, the authorities must at the very least ensure that the judge is aware of the potential engagement of journalistic privilege and that he or she has directed his or her mind to the balancing exercise envisaged by the ECtHR case law*" (also at para 96). These are amongst the "*minimum safeguards*" that, in the Court of Appeal's view, must be read into Section 10 in order to make it capable of operating in a manner compatible with Article 10 ECHR. Another is that a warrant which would or

might result in the disclosure of a source should not issue unless justified by an overriding requirement in the public interest or a pressing social need that is "*convincingly established*" (para 110). All information relevant to the balancing exercise required by Article 10 should be put before the judge (para 112) though the Court of Appeal also emphasised that the *ex parte* application should not be converted into a full-blown trial (para 113).

47. Costello J did not in terms endorse the suggestion in *Fine Point Films and Birney* that, where a search warrant is sought *ex parte*, the applicant is obliged to put on "*a defence hat*". It is clear from *Quirke* that there "*is a duty on investigators to be conscious of the need for the presentation of a fair summary of the facts and of their interest to whatever judge is engaged in issuing a search warrant*" (para 86). *Quirke* also makes it clear that, on an *ex parte* application, there is a duty on the Gardaí "*to address the issue with appropriate care as to that person's rights*" (para 88). Relevant information must not be deliberately withheld (paras 94-95). However, the Court in *Quirke* did not go so far as to hold that applicants for search warrants are subject to a duty of candour equivalent to that applicable on an application for a *mareva* injunction or *Anton Piller* order. That issue does not arise on this appeal and, in my view, it should be left over for consideration in an appeal in which it arises in a concrete way.

***ECtHR Jurisprudence***

48. The Court of Appeal considered that it was necessary to interpret Section 10 in this way because, in its view, compliance with Article 10 ECHR had to be assessed *prior to* the

issuing of a warrant. Any *ex post facto* review – at least a review that took place only after disclosure – would not satisfy the requirements of Article 10: per Costello J at paras 72-79, citing *Sanoma Uitgevers BV v Netherlands* (2010) (Application 38224/03).

49. The Grand Chamber's decision in *Sanoma Uitgevers* certainly indicates that one of the legal procedural safeguards required by Article 10 – described by the court as "*first and foremost*" among such safeguards – is "*the guarantee of review by a judge or other independent and impartial decision-making body*" that is "*invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the source's identity if it does not*" (para 90). That "*independent review*" must be carried out "*at the very least prior to the access and use of the obtained materials*" because any review that "*takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality*" (para 91). Given the "*preventative nature*" of such review, the weighing of potential risks and respective interests must be carried out "*prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed*" (para 91).[10]

50. In light of what was said in *Sanoma Uitgevers* – which was substantially repeated in *Sorokin v Russia* (2022) (Application 52808/09) – it is not clear that Article 10

[10] My emphasis in all cases.

necessarily requires that the "*preventative review*" that it mandates must take place *prior to the issue* of a search warrant. Furthermore, the ECtHR's decision in *Nagla v Latvia* (which post-dates *Sanoma Uitgevers*), on which the Commissioner and the Director relied in this context, suggests that, in some circumstances at least, an "*immediate post factum review*" by an independent investigating judge is capable of satisfying the procedural requirements (" *..prescribed by law …")* in Article 10(2) (paras 89-91). In *Nagla*, the applicant – a TV journalist – had received information from an anonymous source ("*Neo*") to the effect that there were serious security flaws in the database maintained by the Latvian revenue service, making it possible for third parties to access highly confidential taxpayer information held in the database, including information relating to the income received, and tax paid, by public officials. "*Neo*" did not reveal his identity to the applicant at any point and made it clear that he did not wish to do so. The applicant took steps to verify the information and, having done so, she informed the revenue service of a possible security breach. A few days later she announced during a TV broadcast that there had been a massive data leak from the revenue service. Shortly afterwards, the applicant was interviewed as part of a criminal investigation that had been opened into the data leak. She declined to permit access to her email correspondence with "*Neo*" or to provide any information that could lead to the disclosure of his identity. Some months later, a warrant issued for the search of the applicant's home which was executed immediately. During the search, a personal laptop, external hard drive and other data storage devices, containing a large body of personal data as well as most of the applicant's work-related material, were seized. In the ordinary way, a search warrant had to be authorised by the investigating judge or court after examination of the case file. However, under the urgent procedure – which

was the procedure followed in *Nagla* – where a delay could allow the relevant documents or objects to be destroyed, the warrant could be issued by the investigating authority and authorised by a public prosecutor. That was the procedure followed here. A warrant issued under the urgent procedure had to be submitted on the following day to the investigating judge who then examined the lawfulness of and the grounds for the search. The investigating judge had power to declare the search unlawful and to declare evidence gathered by it inadmissible in the criminal proceedings and could also decide on further action in relation to the evidence, including directing withholding the disclosure of journalistic sources.

51. In *Nagla*, the investigating judge had approved the search warrant on the day after its issue and execution. No reasons were given. The following month, following complaint by the applicant, the court president upheld the decision of the investigating judge and held that the evidence obtained on the search was admissible in the criminal proceedings. No hearing was held but the president examined the applicant's written complaint, the case file and the investigator's written explanation. The ombudsman also carried out an inquiry into the search. In his non-binding report, he concluded that the search had violated the freedom of expression and the right not to disclose journalistic sources enshrined in the Latvian Constitution and binding international treaties.

52. Against this background, the applicant relied on *Sanoma Uitgevers* to submit that her Article 10 rights had been interfered with in a manner not "*prescribed by law*". However, the court (Fourth Section) held that the power of the investigating judge to declare the search unlawful, to declare evidence inadmissible and to withhold the

disclosure of the identity of the sources was sufficient to differentiate the case from *Sanoma Uitgevers* (para 90). While the report is not entirely clear on this point, it must have been the case that the investigators were not permitted to access the material seized during the search prior to the search being approved by the investigating judge. That would explain the emphasis placed by the court on the power of the investigating judge to direct the withholding of the disclosure of journalistic sources. Such a power would appear to be *nihil ad rem* if the sources had already been disclosed prior to the investigating judge's review. It would also explain the court's reference to *Telegraaf Media Nederland v Netherlands* (2012) (Application 39315/06), where the court held that an interference with Article 10 was "*prescribed by law*" in circumstances where, without any prior judicial or independent review, a "*surrender order*" had been made pursuant to Dutch law requiring the production of documents which could reveal journalistic sources but where the documents when produced were placed into a sealed container by a notary and given into the custody of an investigation judge pending the determination of a challenge to the lawfulness of the surrender order (para 120). More fundamentally, if Latvian law actually permitted *access* to be obtained to journalistic material potentially disclosing the identity of a source *without* any form of prior judicial/independent assessment, it would have been wholly at odds with the Grand Chamber's decision in *Sanoma Uitgevers* to hold that such interference was compatible with Article 10(2).

53. It should not be overlooked that the court in *Nagla* went on to find a violation of Article 10 on the basis that the search was not proportionate to the legitimate aims of preventing crime and protecting the rights of others and did not correspond to a "*pressing social*

*need*." Therefore, the interference was not necessary in a democratic society. In reaching that conclusion, the court emphasised the sweeping nature of the powers granted by the search warrant to allow the seizure of any information pertaining to the crime under investigation and questioned the basis on which the urgent procedure had been invoked, given the period of time that had elapsed between the initiation of the investigation and the search (a point which can be made here also). That had resulted in the search proceeding "*without any judicial authority having properly examined the relationship of proportionality between the public interest of investigation, on the one hand, and the protection of the journalist's freedom of expression, on the other hand*" (para 98). Furthermore, although the investigating judge's involvement in an immediate *post factum* review was provided for in law, the assessment actually carried out by the investigating judge did not provide sufficient and adequate safeguards against abuse (para 101).

***Does the availability of Judicial Review ensure compliance with Article 10 ECHR?***

54. Here, of course, Section 10 makes no provision for any *post factum* review of a warrant issued under that section. Once a warrant issues, it operates without more to authorise a search and the section effectively requires the warrant's immediate or near-immediate execution (the authority granted by it expires after a week). But, the Commissioner and the Director say, a Section 10 warrant is amenable to judicial review. On their case, it is not necessary to interpret Section 10 as the Court of Appeal did because, in principle, *ex post* review is adequate and is, in fact, available by way of judicial review. That, it is said, is demonstrated by these very proceedings. They also point to this Court's

decision in *CRH plc v Competition and Consumer Protection Commission* [2017] IESC 34, [2018] 1 IR 521 as illustrating that *ex post facto* review may adequately protect and vindicate fundamental rights. The Court of Appeal – so it is said – failed to have adequate regard to the decision in *CRH plc v Competition and Consumer Protection Commission.*

55. I do not agree. Judicial review is not, in my view, an adequate or practical remedy in the circumstances here. Ordinarily, a person whose premises are to be searched will first learn that a search warrant has issued only at the point when the Gardaí attend at the premises for the purpose of executing the warrant. At that point, the person concerned is required to submit to the search. A refusal to provide access may result in forcible entry being made (Section 10(2)(a) authorising the use of "*reasonable force*" for that purpose). Any attempt to obstruct the search will constitute an offence (Section 10(4)). I agree with Costello J that the carrying out of a search of a journalist's home or workplace may, in some circumstances at least, constitute a violation of Article 10 ECHR, regardless of whether material that may disclose a confidential source is seized. A subsequent quashing of the warrant on judicial review will not, of itself, remedy such a violation. More fundamentally, judicial review simply cannot provide a "*guarantee of review by a judge or other independent and impartial decision-making body .. prior to the handing over*" of material protected by Article 10. Here, it is true, Mr Corcoran managed to institute judicial review proceedings, and obtain a stay, before the Gardaí managed to access his iPhone. But that was exceptional. It was possible only because of the happenstance that the iPhone was password protected and that the Gardaí were unable to access it. No doubt, the fact that Mr Corcoran's business partner was also a

solicitor, who was already aware of the Garda investigation, was also a significant – and exceptional – factor in enabling Mr Corcoran to get to court as quickly as he did. Mr Corcoran refused to disclose his password here: whether that refusal amounted to obstruction of the search was not explored in argument. As we have seen, there are other search provisions on the statute-book that expressly impose an obligation to provide passwords to enable computers and other such devices to be accessed. If Mr Corcoran's iPhone had not been password protected (or if the Gardaí had managed to bypass the password protection) or if he held confidential journalistic material in hard copy form (such as notes or print-offs of electronic communications), the Gardaí would have obtained access to such material ever before judicial review proceedings could have been initiated. The State's compliance with Article 10 cannot depend on the contingency of whether the subject of a search can manage to make it to the Four Courts before access takes place.

56. This Court's decision in *CRH plc v Competition and Consumer Protection Commission* is undoubtedly a significant one. However, it did not involve any consideration of the requirements of Article 10 ECHR. Nor did it involve any challenge – at least directly – to the validity of the search warrant (issued pursuant to section 37 of the Competition and Consumer Protection Act 2014). That the warrant had been lawfully issued and executed, and that it authorised the seizure of substantial material from the offices of the Irish Cement Limited, was not in dispute. The issue was whether some of the (large volume) of the material seized and, in particular, digital material comprising personal email accounts, fell outside the scope of the warrant as being private/personal material unrelated to the investigation ("*out-of-scope*" material). In that context, Article 8 ECHR

was engaged. It appears that the material had not in fact been accessed by the Competition and Consumer Protection Commission (CCPC) prior to the commencement of proceedings and the High Court had granted declaratory and injunctive relief, declaring that certain of the material seized by the CCPC had been seized without authorisation under section 37 and preventing the CCPC from accessing or reviewing such material on the basis that doing so would breach the Article 8 rights of the plaintiffs. On appeal, those orders were varied but the orders relating to Article 8 were upheld. That did not resolve all of the issues between the parties. In her judgment (with which Denham CJ and Dunne J agreed), Laffoy J noted that there was a *lacuna* in the 2014 Act in that it did not provide for any mechanism for identifying and excluding out-of-scope material (at para 212). It was a matter for the Oireachtas to fill that *lacuna* but that did not prevent the parties from reaching an agreement on how to proceed (*ibid*): see also the judgment of Charleton J (with which Denham CJ and Dunne J also agreed) at para 267.

57. Nothing in *CRH plc v Competition and Consumer Protection Commission* suggests that the fact that a Section 10 warrant is, in principle, amenable to judicial review means that the availability of judicial review satisfies the procedural requirements of Article 10 ECHR. In my opinion, it clearly does not.

***Conclusions on Article 10***

58. I therefore agree with the foundational premise of the Court of Appeal's analysis. Where a Section 10 warrant would potentially interfere with the protection of a

journalist's sources – as was unquestionably the case here – Article 10 ECHR requires an independent review of whether the warrant is justified. The only means of ensuring compliance with that requirement is to interpret Section 10 as mandating the judge asked to issue the warrant to address that issue. The section 2 interpretative obligation is not unlimited. It does not permit statutory provisions to be recast or rewritten, even where that is necessary to avoid a violation of the ECHR. Ultimately, however, I am not persuaded that the approach taken by the Court of Appeal strays beyond permissible bounds. Where a Section 10 warrant would potentially interfere with the protection of a journalist's sources – *a fortiori* where the warrant is sought for the very purpose of identifying such a source – that must be brought to the notice of the judge and the judge can properly issue the warrant only if he or she is satisfied that the public interest – in this context, the public interest in the prevention and punishment of crime and the protection of public safety – justifies the potential interference with the protection of journalistic sources. Reading Section 10 to that effect is, in my opinion, not materially different to the approach taken to section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1996 that was taken by the High Court and this Court in *Mahon v Keena.* If the judge is to properly exercise that function, it necessarily follows that the necessary facts and circumstances must be disclosed so as to allow the judge to strike an appropriate balance. That is, in essence, the approach taken by the Court of Appeal and the Commissioner and the Director have, in my opinion, failed to demonstrate any material error in its approach.

59. However, it must be understood that reading Section 10 in this way does not by any means resolve all of the issues that it gives rise to or ensure that the section will, in all

circumstances, operate in a manner compatible with Article 10 ECHR. Section 10 is a blunt instrument. It does not permit a judge to make a less intrusive order, such as a production or disclosure order. It does not permit a judge to issue "*a limited or qualified*" search warrant, or attach conditions to such a warrant for the purpose of protecting Article 10 interests. It is clear from the Grand Chamber's decision in *Sanoma Uitgevers* that the absence of such powers is problematic (Judgment, para 92). Section 10 does not contain "*clear criteria, including whether a less intrusive measure can suffice*" (*Ibid*). These features of Section 10 are, it seems to me, beyond the reach of any remedial interpretation permissible under section 2 of the 2003 Act. Equally, it is clear that Section 10 does not provide for or permit an *inter partes* hearing prior to the issuing of a warrant. Again, to interpret Section 10 as permitting such a hearing would be to radically rewrite it. In any event, it is not clear in what circumstances – if any – Article 10 ECHR might require such a hearing. That issue is addressed by Costello J in her judgment but was not really debated on appeal (beyond the bare assertion of Mr McDowell SC, for Mr Corcoran, that an *inter partes* hearing was required) and I would prefer not to express any view on it here.

60. Interpreted in the manner set out above, Section 10 is *capable* of operating in a manner compatible with Article 10, at least. in some circumstances A District Judge is entitled to refuse to issue a warrant where it appears that it would violate Article 10 ECHR. A warrant may properly issue where sufficient justification is established. That being so, I do not think that Section 10 can be said to be incompatible with Article 10. A declaration of incompatibility is not in any event sought by Mr Corcoran. In practice, the breadth of the powers conferred by a Section 10 warrant, and the absence of any

power to limit or qualify its scope and effect, means that the circumstances in which the section can properly be relied on to search the premises of a journalist are likely be very limited indeed. The sweeping nature of the Section 10 power significantly – and unnecessarily – raises the threshold for justification. A more targeted power – such as a power to make a disclosure or production order – would not give rise to the same difficulties. I share the view expressed by Costello J at para 149 that this issue requires the urgent attention of the Oireachtas.

## ARTICLE 40.6.1.i OF THE CONSTITUTION

61. As well as relying on Article 10 ECHR, Mr Corcoran relied on Article 40.6.1.i of the Constitution which, he contended, provides equivalent constitutional protection for journalistic privilege. In the High Court, Simons J held that, as a corollary of the express right in Article 40.6.1.i to free expression (including the right of organs of public opinion such as the press to liberty of expression), journalists may, in certain circumstances, have an implied or derived right to protect the identity of their confidential sources, which was "*seen as necessary to allow journalists to investigate and report on matters of public interest*" (para 60(iii)). The right to protect a source was not absolute or inviolable, particularly in the context of criminal proceedings (para 60(iv)). Any claim to privilege had to be adjudicated on by a court (para 60(v)). Simons J noted that the parties were agreed that any balancing of rights for the purposes of Article 40.6.1.i was not a matter for the District Court under Section 10.

62. In her judgment on appeal, Costello J also took the view that "*journalistic privilege*" had constitutional status and protection under Article 40.6.1.i. (see, eg. paras 35-36 and 50). In her view, it followed from *Cornec v Morrice* and *Mahon v Kenna* that the protection afforded under Article 40.6.1.i of the Constitution and under Article 10 ECHR is "*substantively the same*" (para 97(2); see also para 97(8)).

63. That Article 40.6.i protects journalistic privilege, and that its protection is effectively coterminous with the protection afforded by Article 10 ECHR, was not disputed by the Commissioner and by the Director before this Court. In the absence of dispute, no argument was addressed to these questions.

64. In my view, the Court should reserve its position on these questions to an appropriate appeal in which those questions are live and are the subject of full argument.

65. Before explaining that position further, I should first address the issue of priority. The courts have emphasised the primacy of the Constitution as the fundamental law of the State. The ECHR does not have such status. Its status and effect as a matter of domestic Irish law is as prescribed by the 2003 Act. Issues regarding the relationship and interaction between the Constitution and the ECHR in litigation have been considered in many recent decisions of this Court, starting with *Carmody v Minister for Justice* [2009] IESC 71, [2010] 1 IR 635 and including *Simpson v Governor of Mountjoy Prison* [2019] IESC 81, [2020] 3 IR 113, *Fox v Minister for Justice and Equality* [2021] IESC 61, [2021] 2 ILRM 225, *Clare County Council v McDonagh* [2022] IESC 2, [2022] 1 ILRM 353, *MK (Albania) v Minister for Justice & Equality* [2022] IESC 48

and *Middelkamp v Minister for Justice and Equality* [2023] IESC 2.[11] In general, it is clear that the Constitution should be the first port of call when fundamental rights are at issue.

66. Here, there are a number of factors that, in my view, justify a departure from that general approach in this case. The Article 10 ECHR jurisprudence on the protection of journalists' sources is well developed. It was previously the subject of close consideration by this Court in *Mahon v Keena*. In contrast, the question of whether Article 40.6.1.i protects journalist's sources and/or enshrines some form of journalistic privilege has been the subject of only limited judicial consideration and has never been considered by this Court. [12] No argument was addressed to that issue by the parties. In my view, the question of whether Article 40.6.1.i extends to the protection of journalists' sources and, if so, the parameters and conditions of that protection, are matters which are far too significant to be decided by default. Furthermore, there was no suggestion that, in the circumstances here, Article 40.6.1.i might provide greater protection for Mr Corcoran than Article 10 ECHR does. Had that argument been made, it might have been necessary to engage with the issue in order to determine this appeal.

[11] See also the observations of the Chief Justice, writing extra-judicially, in "The ECHR Act 2003: Ireland and the Post War Human Rights Project" (2022) Vol 6(2) *Irish Judicial Studies Journal* 1.

[12] Simons J in the High Court appears to have read *Mahon v Keena* as an implicit acknowledgement that the principles identified in the Article 10 jurisprudence applied, at least generally, to Article 40.6.1.i also (paragraphs 48 and 49, referring to paragraph 66 of *Mahon v Keena*). I do not agree. As I read it, the point being made by Fennelly J in that paragraph is that, in the event that the provisions of the ECHR conflict with the provisions of the Constitution, the Constitution prevails. Neither party in *Mahon v Keena* argued that there was any *conflict* between Article 10 ECHR and the Constitution. However, that is not at all the same thing as suggesting that the Article 40.6.1.i should be understood as coterminous with Article 10 ECHR.

The focus of the appeal was at all times on Article 10 ECHR, as was the case in the Court of Appeal. Having regard to these various matters, I do not think it is necessary or appropriate to seek to determine definitively whether the protection of journalists' sources is constitutionally mandated for the purposes of this appeal.

67. Even so, some discussion of that issue is, perhaps, unavoidable in light of the approach taken in the Court of Appeal and, in particular, its reliance (and the reliance of the High Court) in this context on the decision of the High Court in *Cornec v Morrice.* As will appear, I have reservations about the analysis in *Cornec v Morrice* and, in my view, it is important that the decision should not be understood as foreclosing further debate as to whether the Constitution protects journalistic privilege and, if so, the scope of that protection and the conditions to which it ought to be subject.

68. The starting point for any such discussion is the decision of the Court of Criminal Appeal in *In re Kevin O' Kelly* (1974) 108 ILTR 97. Kevin O' Kelly was a well-known journalist employed by RTÉ. He had interviewed Seán Mac Stíofáin, the IRA Chief of Staff and the interview had subsequently been broadcast. Mr Mac Stíofáin was subsequently prosecuted in the Special Criminal Court on an IRA membership charge. Mr O' Kelly was called by the prosecution to identify the voice on a recorded interview (during which, according to the prosecution, Mr Mac Stíofáin, made direct or indirect admissions of membership of the IRA). He refused to do so on the basis that to do so would breach a journalistic confidence. As the Court of Criminal Appeal itself observed – and as was also subsequently pointed out by Hogan J in *Cornec v Morrice* – Mr O' Kelly's stance was difficult to understand, given that the broadcast as a whole had

clearly identified Mr Mac Stíofáin. In the circumstances, it may well be that, as Hogan J observed in *Cornec v Morrice*, "*the entire argument based on journalistic privilege was entirely misplaced to begin with*" (at para 41), at least as regards any question of identification of a confidential source. Mr O' Kelly appears to have taken the view that his duties as a journalist precluded him from assisting in the prosecution of his interviewee. On that basis, it appears, he had refused to formally identify Mr Mac Stíofáin's voice and, in the face of that refusal, he had been convicted of contempt of court and sentenced to three months' imprisonment. All of the actors involved – Mr O' Kelly, the prosecution, the Special Criminal Court and, on appeal, the Court of Criminal Appeal – seem to have understood that a real issue of journalistic privilege arose. While the Court of Criminal Appeal set aside the prison sentence, it did not doubt the correctness of Mr O' Kelly's conviction. In its judgment, it set out to give "*assistance to journalists and courts dealing with this matter in the future*". In my view, its observations cannot be lightly dismissed.

69. Giving the judgment of the court, Walsh J stated:

> "*The Court is aware that in general journalists claim the right to refuse to reveal confidences or disclose sources of confidential information. The Constitution, in Article 40 section 6, states that the State shall endeavour to ensure that the organs of public opinion, such as the radio and the press, while preserving their right of liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. Subject to these restrictions, a journalist has the right to publish news and that*

*right carries with it, of course, as a corollary the right to gather 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 informants to gather news. It is also obvious that not every newsgathering relationship from the 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. The fact that a communication was made under terms of expressed confidence or implied confidence does not create a privilege against disclosure. So far as the administration of justice is concerned the public has a right to every man's evidence except for those persons protected by a constitutional or other established and recognised privilege. As was pointed out by the Supreme Court in Murphy v. The Dublin Corporation and the Minister for Local Government [1972] I.R. 215; (1973) 107 I.L.T.R. 65, it would be impossible for the judicial power under the Constitution in the proper exercise of its functions to permit any other body or power to decide for it whether or not certain evidence would be disclosed or produced. In the last resort the decision lies with the courts so long as they have seisin of the case. The exercise of the judicial power carries with it the power to compel the attendance of witnesses and the production of evidence and, a fortiori, the answering of questions by witnesses. This is the ultimate safeguard of justice in the State, whether it be in pursuit of the guilty or the vindication of the innocent. As was pointed out in that case, there may be occasions when different aspects of the public interest may require a resolution of a conflict of interests which*

*may be involved in the disclosure or non-disclosure of evidence but if there be such a conflict then the sole power of resolving it resides in the courts. The judgment or the wishes of the witness shall not prevail. This is the law which governs claims for privilege made by the executive organs of State or by their officials or servants and journalists cannot claim any greater privilege. The obligation of all citizens, including journalists, to give relevant testimony with respect to criminal conduct does not constitute a harassment of journalists or other newsmen. If a journalist were to be invited to witness the commission of a crime in his capacity as a journalist and received the invitation only because of that capacity, the courts could not for a moment entertain a claim that he should be privileged from giving evidence of what he had witnessed simply because of the fact that he was there as a journalist. In the present state of the criminal law, in such a case a journalist concealing such knowledge, like any other person in a similar position, might well find himself guilty of misprision of felony where a felony was concerned. In the present case Mr. O'Kelly was in effect being asked to identify the speaker of words which were claimed to constitute an admission of membership of an illegal organisation and therefore the commission of an offence, namely, the offence of being such a member. Even if the question of confidence arose here, which it clearly did not because, for the reasons already stated, the identity of the person being interviewed was an essential part of the publication, the claim of privilege to refuse to answer the question was unsustainable in law although made in good faith. However, Mr. O'Kelly persisted in his attitude when the Court had very patiently explained the position to him. He was, in the opinion of this Court, rightly convicted of contempt of*

*court and in fact has not appealed against that conviction. While this appeal is simply against the sentence imposed, the Court has thought it necessary to go into the position in some detail as it appears that Mr. O'Kelly was somewhat confused about the legal situation generally and the views expressed by the Court may be of assistance to journalists and courts dealing with this matter in the future.*"

70. That the interests of the administration of justice generally require that "*the public has a right to every man's evidence*" is, of course, a fundamental (though not unqualified) principle. In his judgment in *People (DPP) v J.C* [2015] IESC 31, [2017] 1 IR 417, O' Donnell J (as he then was) observed that:

> "*A criminal or civil trial is the administration of justice. A central function of the administration of justice is fact finding, and truth finding. Anything that detracts from the courts' capacity to find out what occurred in fact, detracts from the truth finding function of the administration of justice.*" (para 488, at page 625)

71. *JC* was concerned with the exclusionary rule rather than any issue of privilege. The fundamental point is, however, the same. All rules that make unavailable potentially probative evidence come at a price. That has been explicitly acknowledged by this Court in the context of legal professional privilege in *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd* [1990] 1 IR 469, per Finlay CJ at 477. The broader the privilege, the heavier the price to be paid in terms of the loss of potentially probative evidence,

with adverse consequences for criminal investigations and for the fair resolution of criminal and civil proceedings (and other forms of investigation/inquiry and adjudication also). That is not an abstract effect – it potentially impacts in a concrete way on victims of crime, accused and civil litigants. Given the fundamental public interest in having access to all potentially probative evidence, any claim to privilege requires careful scrutiny and compelling justification.

72. It appears the issue of journalistic privilege next came before the courts here in *Mahon v Keena*. As I read the judgment of Fennelly J, this Court did not consider it necessary to examine whether the Constitution might provide protection for journalists' sources and instead founded its analysis exclusively on Article 10 ECHR. *In re Kevin O' Kelly* was not referred to in *Mahon v Keena.* In his judgment in this appeal, Hogan J suggests that *In re Kevin O' Kelly* has been "*overtaken*" by *Mahon v Keena.* With respect, I find it difficult to see how that might be so. Apart from the fact that this Court made no reference to *In re Kevin O' Kelly* in *Mahon v Keena,* it was addressing what is, in my view, a quite different question to that addressed in *In re Kevin O' Kelly.* The ECHR is a quite different code to the Constitution. It simply does not follow from the fact that Article 10 ECHR protects journalistic privilege that Article 40.6.1.i of the Constitution is to be construed as doing so also; still less does it follow that, if journalistic privilege is indeed protected at constitutional level here, the parameters of that protection are necessarily materially the same as those applicable to Article 10 ECHR. The Constitutional claim must be assessed separately and independently, as is clear from the authorities cited at para [65] above.

73. In his judgment, Hogan J takes issue with this analysis. He suggests that, if my understanding of *In re Kevin O' Kelly* is correct, then there would be a conflict between the Constitution and the Convention and the approach taken by this Court in *Mahon v Keena* would have effectively involved giving the Convention a superior status to the Constitution. That, with respect, simply does not follow. *In re Kevin O' Kelly* is a decision of the Court of Criminal Appeal. It involved an appeal against sentence only. The remarks made by the court were clearly *obiter*. Furthermore, I do not read the court's judgment as suggesting that the Constitution precluded any recognition of journalistic privilege. The court's insistence that journalists cannot claim "*any greater privilege*" than the privilege that could be claimed "*by the executive organs of State or by their officials or servants*" – claims that were to be resolved by the courts, not on the basis of the "*judgment or the wishes of the witness*" – excludes any such reading of *In re Kevin O' Kelly*. Its value is purely persuasive, as an analysis of the implications of recognising any wide-ranging journalistic privilege, particularly if such privilege is afforded constitutional status. Were the Oireachtas to legislate for the protection of journalistic privilege, *In re Kevin O' Kelly* would not, in my view, provide a basis for impugning the constitutionality of such legislation. Similarly, it provides no basis for impugning the 2003 Act insofar as that Act gives effect in Irish law to Article 10 ECHR, including its protection of journalistic privilege.

74. The issue of journalistic privilege appears to have next come before the courts herein *Walsh v News Group Newspapers* [2012] IEHC 353, [2012] 3 IR 136 in the context of an application for discovery, in circumstances where the defendants asserted privilege as an answer to the application, relying (inter alia) "*on the provisions of the*

*Constitution, in particular, Article 40.3 and Article 40.6.1 as interpreted in the light of the European Convention on Human Rights Act 2003*…" (para 8). The 2003 Act does not, of course, govern the interpretation of the Constitution. In any event, the High Court (O' Neill J) was satisfied that "*[j]ournalistic privilege is now firmly established in our legal jurisprudence largely resulting from [Article 10]*" (para 15). The analysis supporting that statement is founded entirely on Article 10 ECHR. Two aspects of the analysis are of particular interest. The first is O' Neill J's suggestion that Article 10 may provide only limited protection (if any protection at all) to "*improper journalism*", such as where a newspaper or journalist offers financial inducements to a source (para 21). On the facts, it was not necessary for him to reach a concluded view on that issue. The second is the judge's view that Article 10 protection is *a priori* excluded where information is disclosed in breach of a criminal prohibition on disclosure, that is to say where the disclosure is, in itself, a criminal offence (para 28). No such issue is presented here and so it is not necessary to consider whether *Walsh v News Group Newspapers* might have put the matter too far in suggesting that the fact that disclosure involves a criminal offence *ipso facto* excludes the application of Article 10.

75. We next come to *Cornec v Morrice*. It concerned an application under section 1 of the Foreign Tribunals Evidence Act 1856 in aid of litigation in Colorado. The facts and issues in the Colorado litigation were complex but one of the issues was whether the plaintiff had breached a non-disparagement clause in a share purchase agreement with the defendant by directly or indirectly providing information to T (a journalist with the *Sunday World*) and/or G (a blogger and former theologian with a particular interest in investigating religious cults) resulting in articles being published by T in the *Sunday*

*World* and by G in his blog critical of the defendant, her company INE and another person, Mr Q, closely associated with her (the suggestion being that Mr Q was effectively involved in operating a cult for financial gain). On the application of the defendant, Ms Morrice, an order was made *ex parte* for the examination of Ms T and Mr G, each of whom then applied to have the order set aside.

76. Having disposed of other objections to the order, Hogan J considered whether, as a matter of Irish law, a journalist would be obliged to disclose her sources in the circumstances presented. Having referred to *In re Kevin O' Kelly, Mahon v Keena* and *Walsh v Newsgroup Limited*, he observed that there is, in strictness, no such thing as journalistic privilege: the protection is, rather, "*the high value which the law places on the dissemination of information and public debate*", a process to which journalists were "*central*", a point recognised in Article 40.6.1.i of the Constitution in its recognition of the "*rightful liberty of expression*" of the press. In Hogan J's view, Article 40.6.1.i (particularly the Irish language version) afforded a *"privileged status*" to the organs of public opinion (para 42). The constitutional right in question (the right to free expression of the press generally, and its liberty to criticise Government policy especially) "*would be meaningless if the law could not (or would not) protect the general right of journalists to protect their sources*" (para 43; emphasis in the original). While that right was not absolute or inviolable (thus differing from legal professional privilege), even so

> "*the public interest in ensuring that journalists can protect their sources remains very high, since journalism is central to the free flow of information*

*which is essential in a free society. This is all underscored and tacitly complemented by the entire constitutional edifice, such as the democratic nature of the State (Article 5); the accountability of the executive branch to the Dáil (Article 28.4.1§) and the provisions in relation to elections and referenda. I may venture here to repeat my comments in Doherty v. Referendum Commission [2012] IEHC 211, (Unreported, High Court, Hogan J., 6th June, 2012) at p. 10 to the effect that the referendum process presupposes that the citizenry will "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". If journalism and the media did not enjoy at least a general protection in respect of their sources, that robust political debate – a sine qua non in any democratic society – would be still born. Only the naïve would suggest otherwise.*" (para 47)

77. Noting that while Article 10 ECHR does not "*in terms*" privilege the media in the same way as Article 40.6, Hogan J observed that the importance of press freedom has been a cornerstone of the ECtHR's jurisprudence since at least the *Sunday Times v United Kingdom* and the protection of journalistic sources is regarded as a "*core value protected by Article 10*" (para 47). The overlap between the Constitution and the ECHR is "*virtually a complete one*"; each mandates the same approach, namely whether the case for the restriction on or overriding journalistic privilege been convincingly established (para 49).

78. Turning to the position of Mr G, while he was not a "*journalist in the strict sense of the term*", it was:

> " *... clear that his activities involve the chronicling of the activities of religious cults. Part of the problem here is that the traditional distinction between journalists and lay people has broken down in recent decades, not least with the rise of social media. It is probably not necessary here to discuss questions such as whether the casual participant on an internet discussion site could invoke Goodwin v. United Kingdom (App. No. 17488/90) (1996) 22 E.H.R.R. 123 style privileges, although the issue may not be altogether far removed from the facts of this case.*
>
> *[66] Yet [G]'s activities fall squarely within the "education of public opinion" envisaged by Article 40.6.1§. A person who blogs on an internet site can just as readily constitute an "organ of public opinion" as those which were more familiar in 1937 and which are mentioned (but only as examples) in Article 40.6.1§, namely, the radio, the press and the cinema. Since. [G's] activities fall squarely within the education of public opinion, there is a high constitutional value in ensuring that his right to voice these views in relation to the actions of religious cults is protected. It does not require much imagination to accept that critical information in relation to the actions of those bodies would dry up if. [G] could be compelled to reveal this information, whether in the course of litigation or otherwise. It is obvious from the very text of Article 40.6.1 that the right to educate (and influence) public opinion is at the very heart of the rightful*

*liberty of expression. That rightful liberty would be compromised – perhaps even completely jeopardised – if disclosure of sources and discussions with sources could readily be compelled through litigation.*"

It followed, therefore, that G had a similar interest to that of T in the protection of his sources.

79. A notable feature of *Cornec v Morrice* is that the identity of Ms T's source was known, or at least appears to have been readily ascertainable (paras 54-56). However, Hogan J did not consider that there was "*any ex ante distinction between the protection of the source on the one hand and the contents of what the source disclosed on the other*" and in both cases "*the public interest in protecting the journalist from compelled disclosure is very high, since the exploration of the contents of any discussions with the source also has the ability significantly to hamper the exercise of freedom by the journalist in question*" (at para 61, original emphasis). As regards both T & G, Hogan J concluded that there were no compelling grounds capable of outweighing the public interest against the compelled disclosure of the identity of their sources or the contents of their communications.

80. The unsuccessful applicant appealed to the Supreme Court but the Colorado proceedings settled before the appeal was heard. *Cornec v Morrice* appears not to have been considered by this Court or by the Court of Appeal. It has, however, been cited in a number of High Court decisions, principally in the area of discovery, including my decision (sitting in the High Court) in *Desmond v Irish Times Ltd* [2020] IEHC 95.

81. In his judgment in this appeal, Hogan J substantially reprises his analysis in *Cornec v Morrice*. Referring to the judgment of Walsh J in *In re Kevin O' Kelly,* he expresses the view that it unrealistic to suggest that the media could discharge its functions of educating public opinion and critiquing Government policy without at least some degree of protection of journalistic sources and asks rhetorically anyone would be prepared to risk their reputation and employment prospects by disclosing sensitive material to a journalist "*without an assurance as to confidentiality*". The protection of sources is, in his view, "*integral to a free press*" without which there is no democracy and the combined effect of Articles 5 and Article 40.6.1. of the Constitution is to give constitutional standing to the protection of journalistic sources, albeit that such protection is not absolute (para 61 and following).

82. These views clearly deserve to be given great weight. Even so, many aspects of his analysis are, in my view, contestable. Firstly, it seems arguable – at least – that, so far from conferring any form of "*privileged status*" on the "*organs of public opinion, such as the radio, the press, the cinema*", Article 40.6.1.i is concerned with ensuring that such institutions may be subjected to specific regulation – beyond that applicable to citizens generally – where necessary to prevent the undermining of "*public order or morality or the authority of the State*". Certainly, there appears to be nothing in the language of Article 40.6.1.i – whether in the English or Irish versions – to indicate an intention that the "*organs of public opinion*" should enjoy any *greater* freedom of expression than citizens generally. That would seem to imply that any source protection that might be read into Article 40.6.1.i should apply to *all* citizens exercising their expressive freedom, rather than being confined to the media (however narrowly or

broadly defined). Citizens are, after all, the fundamental actors in our democracy: Article 6. If it does not appear necessary or appropriate to extend such constitutional protection to citizens generally, does that not undermine the case for a constitutionally derived protection for the media? [13]

83. Secondly, it is not (or at least does not appear to me to be) self-evident that the constitutional rights of the press would be "*meaningless*" and that "*robust political debate .. would be still born*" unless Article 40.6.1.i is read as protecting the right of journalists not to disclose their sources. Unless Article 40.6.1.i is read as providing for the absolute protection of sources from disclosure in all circumstances – and that is not suggested here – the fact is that journalists are not, and will not be, in a position to ever offer sources any unqualified "*assurance as to confidentiality*". Moreover, it would seem implausible to suggest that there was no "*robust political debate*" in the State prior to *Cornec v Morrice* (or prior to the decision of the ECtHR in *Goodwin* or prior to the enactment of the 2003 Act – the point holds good no matter what the precise cut-off may be). Informed political debate, and criticism of Government policy, does not, in general, depend on the use of confidential sources. By the same token, if it is said that a general constitutionally-located right of journalists to protect their sources is a *sine qua non* of an effective press, does it follow that there was no effective press in Ireland prior to *Cornec v Morrice*? Again, any such claim would appear implausible.

[13] Versions of this point are made in *Branzburg* and *R v National Post* (both referred to later in this judgment)

84. This is not, I emphasise, to question the value of press freedom in the State or to suggest that, leaving aside the 2003 Act and Article 10 ECHR, Irish law does not or should not protect confidential journalistic sources. I agree entirely with the observations of Hogan J as to the importance of a free and independent press for our democracy. But the issue of whether such protection should be afforded *constitutional* status in my view requires distinct and careful assessment. Furthermore, even if Article 40.6.1.i, on its own or in combination with Article 5, properly gives rise to a *constitutional* protection, it is not to be assumed that the dimensions of that protection necessarily mimic the approach developed, over many decades, by the Strasbourg Court on the basis of Article 10 ECHR.

85. In this context, it is notable that in both the United States and Canada – jurisdictions in which the freedom of the press is constitutionally entrenched in clear and unambiguous terms – claims to *constitutional* protection of journalistic privilege have failed. Thus the US Supreme Court has declined to read the First Amendment of the US Constitution – which is generally regarded as the "*gold standard*" of expressive freedom and which refers expressly to the freedom of the press – as encompassing any testimonial privilege for reporters: *Branzburg v Hayes* 408 US 665 (1972).

86. As Fennelly J noted in *Mahon v Keena*, *Branzburg* was a 5-4 decision (with vigorous dissenting opinions from Douglas J and Stewart J (in which Brennan and Marshall JJ joined)) and the decisive fifth vote was provided by Powell J who, in a very brief concurrence, emphasised the limited nature of the Court's holding and appeared to suggest that some form of qualified privilege might be available on a case-by-case basis

(709-710). As a result, there has been much subsequent uncertainty as to the reach and effect of the decision[14] and shifting currents of opinion on that issue within the Federal courts.[15] It was, and remains, controversial.

87. In a significant decision in 2006, *In re Judith Miller* (2006) 438 F 3d 1138, the Court of Appeals for the DC Circuit affirmed the District Court's finding that a number of journalists were guilty of civil contempt of court for refusing to give evidence in response to subpoenas served by a Special Counsel investigating the naming of a CIA officer in the media. The Panel held that the case was governed directly by *Branzburg* and that *Branzburg* precluded any claim to a First Amendment privilege. It went on to consider whether any common law privilege might apply. The Panel split on that issue. One judge considered that a common law privilege existed, another that it did not. The third judge considered that it wasn't necessary to reach that question given that all three judges took the view that, even if a common law privilege existed, it would not avail the appellants. *In re Judith Miller* provided the Supreme Court an opportunity to revisit *Branzburg* but it denied the media's *certiorari* petition.

[14] As one commentator has observed, "*the waters that were originally muddied by Justice Powell in Branzburg have remained murky for more than thirty years*" (Eliason, "Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege" (2006) 24 *Cardozo Arts & Entertainment Law Journal* 385 (2006) ("*Eliason 2006*") at 395.

[15] See Kelly, "Black and White and Read All Over: Press Protection After Branzburg" 57 *Duke Law Journal* 199 (2007), Smolla, "The First Amendment, Journalists, and Sources: A Curious Study in 'Reverse Federalism" 29 *Cardoza L Rev* 1423 (2008) and Eliason, "The Problems with the Reporter's Privilege" *57 American University Law Review* 1341 (2008) ("*Eliason 2008*")

88. The facts in *In re Judith Miller* might give even the most ardent advocate for a broad constitutional protection of journalists' sources pause for thought. The Special Counsel's investigation arose from the disclosure in the media that the wife of a former US Ambassador was a CIA agent. Unauthorised disclosure of the identity of a CIA agent is a violation of federal law. The information was leaked by sources within the administration as an act of political revenge against her husband for publishing a story casting doubt on the Bush administration's claims that Iraq possessed weapons of mass destruction (WMD). Those sources could hardly have been more remote from those "*who volunteer to assist the press in informing the public about matters of public interest*" that the ECtHR spoke of *Stichting Ostade Blade.*[16] One of the journalists involved – Ms Miller – had earlier written a series of articles in the *New York Times,* planted by unidentified sources within the Bush administration and the Iraqi émigré community which apparently substantiated the WMD claims. That reporting was in turn relied on by the administration to bolster its case for invading Iraq. The WMD claims were wholly false. Following the ruling of the Court of Appeals, Ms Miller maintained her refusal to testify and spent three months in jail before she agreed to give evidence, after being released by her source – Lewis "*Scooter*" Libby, the Chief of Staff to the Vice President – from any obligations of confidentiality. Libby was subsequently convicted and sentenced to imprisonment. Ms. Miller was lauded for her defiance of a court order (in an editorial, the *New York Times* declared that "*[t]his is a proud but*

[16] Referring to these events in *R v National Post*, Binnie J observed that the "*simplistic proposition that it is always in the public interest to maintain the confidentiality of secret sources is belied by such events in recent journalistic history.*"

*awful moment for The New York Times and its employees*"). [17] In contrast, *Time* was excoriated for obeying the order (in the same editorial, the *New York Times* professed itself " *deeply disappointed*" by *Time*'s decision).[18]

89. The Canadian Charter of Rights and Freedoms, in Section 2(b), also expressly recognises as a fundamental freedom the "*freedom of the press and of other media of communications*". Even so, in *R v National Post* [2010] 1 SCR 477 the Supreme Court of Canada unanimously rejected efforts to ground a journalist-source privilege in the Charter. Writing for the entire court on this issue, Binnie J made the point (*inter alia*) that the Charter protection attaching to freedom of expression was not limited to the "*traditional media*" but was enjoyed by "*everyone*" who chose to exercise that freedom, whether by blogging, tweeting or shouting on a street corner and "*to throw a constitutional immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers and whichever 'sources' they deem worthy of a promise of confidentiality and on whatever terms they much choose to offer it .. would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy*" (para [40]).

90. The Supreme Court went on to consider whether a sub-Charter privilege should be recognised. While rejecting any "*class privilege*" based on the relationship between

[17] *New York Times* 7 July 2005

[18] See the discussion in Eliason, "The Problems with the Reporter's Privilege" at 1371 - 1374, as well as Joyce, "The Judith Miller Case and the Relationship between Reporter and Source: Competing Visions of the Media's Role and Function", 17 *Fordham Intellectual Property Media and Entertainment Law Journal* 555 (2007)

journalist and source, the court went on to consider and adopt a case-by-case privilege model, based on the so-called "*Wigmore criteria*" but informed also by Charter values (para [50]). The court gave further guidance on the operation of this privilege in *Globe & Mail v Canada (AG)* [2010] 2 SCR 592. A detailed discussion of the *Wigmore* criteria is beyond the scope of this judgment but it may be noted that they have been recognised and applied in this jurisdiction (though not in the context of journalistic privilege): *Cook v Carroll* [1945] IR 515 and *ER v JR* [1981] ILRM 125.

91. In 2017, the Canadian Parliament legislated to enhance the protection of journalistic sources, effectively adopting the four-stage Wigmore test applied in *R v National Post* but reversing the onus of proof so that the person seeking disclosure now has the burden of showing that disclosure is necessary: see the discussion by the Supreme Court of Canada in *Denis v Côté* [2019] 3 SCR 482. No Federal "*shield law*" has been enacted in the United States. However, shield laws – in varying terms – have been enacted in a large majority of States and in DC.

92. My purpose in referring to these developments in the United States and Canada is not to suggest that the approach taken in those jurisdictions should necessarily be followed here. But the decisions of the US and Canadian Supreme Courts referred to above certainly seem to undermine the argument that explicit constitutional protection of the freedom of the press must inevitably lead to the recognition of a *constitutional* protection against the compelled disclosure of sources by journalists.

93. Many difficult issues need to be addressed in this context. The first is one of basic definition – to whom should any privilege apply? Who is a journalist in this context? If it encompasses the "*lonely pamphleteer*" referred to by White J in *Branzburg* or the blogger in *Cornec v Morrice*, then that would appear to have very significant implications for law enforcement and the administration of justice generally. On the other hand, any attempt to restrict the privilege would raise significant issues, both of principle and practicality. One commentator has suggested that, for the purposes of source protection, "*classification as a journalist must be reserved for diligent, responsible attempts to inform the public of verified information that they have a genuine interest in receiving*"[19] Similarly, Carolan suggests that the presumptive disclosure exemption "*should be confined to situations where an exemption is sought in respect of material obtained by a journalist in good faith, the disclosure of which would undermine responsible newsgathering practices*".[20] There may be merit in such suggestions but they do not readily lend themselves to articulation as *constitutional* standards of general application. Further the application of such quasi-qualitative criteria by courts would likely be extremely controversial.[21] Further – and challenging – issues arise as to whether any privilege should be limited to situations where an express undertaking of confidentiality is given to the source (as appears to be the position under the Canadian legislation referred to above) or whether it should apply even in the absence of any assurance of confidentiality (no assurance of confidentiality

[19] Tambini "What is journalism? The paradox of media privilege" (2021) *EHRLR* 523, 527.

[20] Carolan 2017, at 196.

[21] See further the discussion in Eliason 2006, at page 428 and Oliphant, "Freedom of the Press as a Discrete Constitutional Guarantee" (2013) 59 *McGill LJ* 283, at 297.

was, of course, given in *Mahon v Keena*). A further significant issue is whether the privilege applies only to the identity of the source or whether (as Hogan J held in *Cornec v Morrice*) it is capable of protecting the content of communications between journalist and source from disclosure (the protection of communications, even where the identity of the source is known, appears to me to raise significant issues). There is then the issue, already flagged, of whose privilege it is and by whom it may be waived. Finally – and perhaps most significantly – the threshold for compelled disclosure, and the factors to be considered in making that assessment, would have to be identified.

94. These issues must, in my view, be addressed prior to any decision being made as to the existence of any form of journalistic privilege, whether that is to be located in the provisions of Article 40.6.1.i (and/or Article 5) or in the common-law. In my view, it would not be appropriate to declare a privilege in principle, leaving its fundamental contours to be delineated later. Neither would it be appropriate, in my view, to proceed on the basis that Article 40.6.1.i should be read as embodying such a privilege because Article 10 ECHR has been held to do so or to proceed on the assumption that any constitutional privilege should necessarily be of the same scope as the protection under Article 10. That that is not an appropriate approach is clear from this Court's decision in *Simpson*.

95. Even if this Court were to hold that journalist-source privilege ought to be protected as a matter of Irish law – and nothing in this judgment should be read as precluding such an outcome being reached in an appropriate case, after full argument – it would not necessarily follow that the Court should recognise a *constitutional* privilege. The

existence of a properly functioning press undoubtedly has constitutional value. However, legal professional privilege undoubtedly serves constitutional values (enabling effective access to the courts and vindication of constitutional rights, including the right to a criminal trial in due course of law) but it has not, to date at least, been held by this Court to be a *constitutional* privilege. In any event, legal professional privilege presents few, if any, of the definitional challenges that journalistic privilege does. It applies only in defined circumstances and within defined relationships. The actors are readily identifiable. It applies only to legal practitioners (and not to other professionals, even if they give legal advice)[22] and their clients. Litigation privilege applies only to communications made for the dominant purpose of court proceedings, actual or contemplated proceedings and is time-limited.[23] There is clarity as whose privilege it is (the client's) and by whom it may be waived. The (limited) circumstances in which the privilege may be lost are clear in principle. It was the absence of these limitations that led the Supreme Court of Canada to conclude that journalistic privilege should be recognised on a case-by-case basis rather than as a class privilege.

96. In the absence of any debate about the issues identified above, it would in my view be inappropriate for this Court to express any concluded view on whether Irish law, and in particular the provisions of Article 40.6.1.i of the Constitution, provides a privilege or protection against the compelled disclosure of journalists' sources and, if so, what the

[22] See *R (Prudential plc) v Special Commissioner of Income Tax (Institute of Chartered Accountants in England and Wales and others intervening)* [2013] UKSC 1, [2013] 2 AC 185.

[23] *University College Cork v Electricity Supply Board* [2014] IEHC 135, [2014] 2 IR 525.

nature and scope of such privilege or protection may be. These important issues should be decided only after full adversarial argument.

97. In the result, and for the reasons set out earlier in this judgment, I would dismiss the appeal and affirm the order made by the Court of Appeal.

# 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.