**THE SUPREME COURT**

**JUDICIAL REVIEW**

**Supreme Court Record No. 135/2016**

**Between:**

**KEVIN TRACEY**

**Applicant/Appellant**

**and**

**DISTRICT JUDGE AENEAS McCARTHY**

**Respondent**

**and**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**Notice Party**

**and**

**THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION**

**Amicus Curiae**

---

# LEGAL SUBMISSIONS OF THE AMICUS CURIAE

---

## 1. INTRODUCTION

1.1. The *Amicus Curiae* (hereafter "the Commission") has been invited by this Honourable Court to intervene in these proceedings. In making the submissions below, the Commission has endeavoured to limit same to human rights issues within its remit, and does not seek to entrench on matters of factual dispute. The facts are set out extensively in the written submissions of the Appellant and of the

Notice Party and are also referred to in the judgment of McGovern J. in the High Court.[1]

1.2. As set out below, the Committal Warrant signed by the Respondent in the present case describes the Appellant as having in open court committed a contempt of court *"by being abusive to the court and he accused the court of being corrupt"*. The Commission does not consider it as part of its role in these proceedings to comment on whether the offence of contempt in the face of the Court was in fact made out. The ground to which the appeal is confined relates only to the manner in which the finding of contempt of court was made against him. Accordingly, considerations such as whether the finding of contempt should be seen as having been in breach of the Applicant's right to freedom of expression under Article 10 of the ECHR would appear to be outside the scope of this appeal.

## 2. JUDGMENT OF THIS HONOURABLE COURT GRANTING AN EXTENSION OF TIME – 10TH FEBRUARY 2017

2.1. This Honourable Court granted the Appellant an extension of time to appeal, noting the unusual factual and procedural background, and leaving aside the question of whether the case should be considered as falling under the appellate regime in place since the 33rd Amendment of the Constitution or under the previous regime. Clarke J. gave judgment for the Court, and at paragraph 3.2 set out what he considered to be the central issue to be decided in the appeal:

*"3.2 The core issue which Mr. Tracey wishes to pursue on his appeal is as to whether, in all the circumstances which pertained on the occasion when he was committed for contempt in the face of the Court by the respondent, it was, in the light of the Constitution, Irish jurisprudence, the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights together with, potentially, any applicable European Union law, permissible to have made a finding of contempt and imposed the penalty of imprisonment which followed."*

[1] *Kevin Tracey v District Judge Aeneas McCarthy* [2008] IEHC 59, 6 March 2008

2.2. Clarke J. further refined the issue in the following paragraph, stating:

*"[T]here is, in my view, an important question of general public importance raised by this case being the precise circumstances in which it is permissible, in the light of any or all of the legal materials which I have cited, to commit someone for contempt in the face of the Court."*

2.3. At paragraph 5.1 of his judgment, he specified the ground to which the appeal would be confined:

*"5.1 First I should state that it seems to me that the only basis on which Mr. Tracey has established arguable grounds for appeal is his contention that the manner in which a finding of contempt in the face of the Court was made against him breached his rights under the Irish Constitution, under the European Convention on Human Rights or under European Union law. It is also that ground which would warrant finding that the constitutional threshold to appeal to this Court under the new constitutional architecture has been met. In those circumstances I would confine the appeal to that ground."*[2]

## 3. STATUTORY CONTEMPT OFFENCES UNDER THE 1851 AND 1871 ACTS

3.1. Section 6 of the *Summary Jurisdiction (Ireland) Amendment Act 1871* applies to contempt of court[3] within the Dublin Metropolitan District, and provides:

---

[2] The Commission notes from the judgment of McGovern J. herein that leave to bring judicial review proceedings had been granted on grounds (e).1-3 only. However, ground (e).5 in the Applicant's Statement of Grounds of the 1st June 2006 appears to be the ground which relates most closely to the ground identified by Clarke J. at paragraph 5.1 of his judgement of the 10th February 2017. The Commission in these submissions has endeavoured to deal with the slightly wider ground identified by Clarke J., which, unlike ground (e).5, does not expressly refer to s.6 of the *Summary Jurisdiction (Ireland) Amendment Act 1871* was applied.

[3] Section 6 of the 1871 Act appears to concern contempt *"in the face of the court",* a term which appears to be generally understood as carrying with it a notion of physical presence in the courtroom and abuse of the court and/or the undermining of the court process (the Oxford Dictionary of Law (Oxford University Press, 7th ed., 2009) has after this term *"e.g. using threatening language or creating a disturbance in court"*). However, it can be noted that s.6 also contains the broad term *"any other contempt of such court"* - it is unclear whether this includes contempts of court other than those which would traditionally be seen as contempts *"in the face of the court"*, but the reference to sentencing *"before the rising of such court"* would seem to indicate that s.6 is probably limited to contempts committed in the courtroom (or perhaps its environs).

*"If any person shall wilfully insult any justice or justices sitting in any court within the police district of Dublin Metropolis, or shall commit any other contempt of such court, it shall be lawful for such justice or justices, by any verbal order, either to direct such person to be removed from such court, or to be taken into custody, and at any time before the rising of such court by warrant to commit such person to gaol for any period not exceeding seven days, or to fine such person in any sum not exceeding forty shillings."*

3.2. The contempt provisions of s.9 of the *Petty Sessions (Ireland) Act 1851*, applying in courts outside Dublin, are in almost identical terms, and also include the same requirement that any sentence be imposed *"before the rising of such court"*. Thus the statutory prosecution of contempt in the face of the court in the District Court, as occurred in the present case, is subject to an important restriction not present in respect of common law contempt prosecutions, namely that conviction and sentencing must be carried out by the same judge who was insulted or who witnessed any other contempt and on the same day that the contempt occurred, and before the Court has risen.

3.3. Should this Honourable Court find that the provisions of the 1851 and 1871 Acts which provide for the imposition of a fine and a sentence following an almost immediate procedure are incompatible with the Constitution and/or the ECHR, an important question which would then arise would be whether the District Court has any *non-statutory power* to deal with contempt, not subject to the above statutory restrictions. Finlay P. in ***State (Commins) v. McRann***[4] concluded that all courts of record enjoy an inherent jurisdiction to deal summarily with contempt:

*"For these reasons I conclude that the inherent jurisdiction of the Courts to deal summarily with contempt, at least as enjoyed by courts of record, has not been in any way altered or diminished by the provisions of the Constitution of 1937, and*

[4] [1977] 1 IR 78, at 88.

*that Article 38 of the Constitution must be interpreted as qualified by the provisions of Article 34."*

3.4. Since the District Court is a court of record[5], it seems to follow that it also has an inherent common law power to *"deal summarily with contempt"*. The Law Reform Commission has expressed doubt that the District Court's inherent contempt jurisdiction extends *beyond* contempt in the face of the Court[6]. It is submitted that the Law Reform Commission, in finding that the District Court has jurisdiction to deal with contempt in the face of the court, is not merely acknowledging the provisions of the 1851 and 1871 Acts, but rather is of the view that the District Court has an *inherent* power to deal with contempt in the face of the court[7].

3.5. Since the statutory provisions concerning contempt in the District Court require conviction and sentencing for contempt in the face of the court to be carried out by the judge who witnessed or was subject to the contempt (before he or she rises), the existence of a common law power to try and sentence for contempt in the District Court would seem to be an important factor in the context of the discussion below regarding whether and when the alleged contempt could be dealt with by a different judge in a different sitting.

3.6. It is relevant to note also in this regard that the High Court has jurisdiction to try and sentence for a contempt in the face of the court committed in the District Court[8].

---

5 Since the enactment of s.13 of the *Courts Act 1971*.

6 See the Law Reform Commission *Consultation Paper on Contempt of Court* (LRC CP4-1991) at page 413, where it states *"Under the present law, so far as criminal contempt is concerned, it is clear that the Circuit Court and District Court have jurisdiction with regard to in facie contempt; beyond that the position is less clear, but it is particularly doubtful whether the District Court's jurisdiction extends to such matters as the sub judice rule, for example"*. See also its *Report on Contempt of Court* (LRC 46–1994) at page 6.

7 It might be seen as somewhat unsatisfactory however if it is the case that the District Court has a jurisdiction to impose a sentence of 12 months' imprisonment for common law contempt in the face of the court while being restricted to a maximum sentence of 7 days' imprisonment should the Court instead decide to convict under s.6 of the 1871 Act or s.9 of the 1851 Act.

8 See the Law Reform Commission *Consultation Paper on Contempt of Court* (LRC CP4-1991) at page 414.

## 4. APPLICABILITY OF THE PROTECTIONS OF ARTICLE 38 AND ARTICLE 6: DISTINCTION BETWEEN COURT MANAGEMENT SANCTIONS AND CRIMINAL SANCTIONS FOR CONTEMPT IN THE FACE OF THE COURT

4.1. Contempt in the face of the court is traditionally seen as a criminal offence, and a sentence of imprisonment imposed therefore is traditionally seen as punitive in nature. It is submitted however that certain sanctions for contempt in the face of the court, such as removal from the courtroom, and committal to custody for the remainder of the sitting of the Court, should be seen as being available more for the purpose of court management than for punitive purposes, thus arguably taking such sanctions outside the remit of Article 38 and Article 6. The caselaw of the European Court of Human Rights (discussed further below) establishes this distinction, with the Strasbourg Court using the term *"disciplinary"* in reference to the non-criminal sanctions in this context.

4.2. In relation to the imposition of a fine and the imposition of a sentence of imprisonment, the Commission takes the view that these sanctions should continue to be regarded as criminal in nature, thus bringing with them the aforesaid protections.

4.3. The courts would appear to have a legitimate concern that, if they were unable to take immediate action to maintain discipline and order, they would lose control of the courtroom thus jeopardising the respect and dignity to be afforded to the judicial process. The Law Reform Commission of Canada explained the need for immediate steps as follows, as quoted by the Irish Law Reform Commission[9]:

*"First, the judge must remain in full control of the hearing. If it is interrupted by misbehaviour in the court-room, he must take steps to restore order as quickly and effectively as possible. The time factor is crucial: dragging out the contempt*

[9] Law Reform Commission *Consultation Paper on Contempt of Court* (LRC CP4-1991) at page 238.

*proceedings would mean a lengthy interruption to the main proceedings, thereby paralysing the court for a time, and indirectly impeding the speed and efficiency with which justice is administered.*

*Secondly, the judge's power to control the court proceedings would be weakened if contempt proceedings were heard by another court. The second court would have to hear evidence about the act, with a judge before whom the disruption had taken place as principal witness. And should the accused again misbehave in court, the contempt case itself would have to be referred to still another court, and so on. The administration of justice could be brought to a complete standstill.*

*Accordingly, to ensure the effective administration of justice, the presiding judge must remain in control of the proceedings. He must therefore be able to use the classical summary procedure for cases of misbehaving in court."*

4.4. It appears from the caselaw of the European Court of Human Rights however that it is possible to immediately impose relatively significant sanctions for the purpose of maintaining discipline and order without triggering the application (or breach) of Article 6. In ***Ravnsborg v. Sweden***[10], the European Court of Human Rights acknowledged that disciplinary actions which fall short of being sanctions for criminal offences are a necessary part of keeping order in court proceedings, and found that such actions are not covered by Article 6 of the ECHR, finding:

*"34...Rules enabling a court to sanction disorderly conduct in proceedings before it are a common feature of legal systems of the Contracting States. Such rules and sanctions derive from the indispensable power of a court to ensure the proper and orderly functioning of its own proceedings. Measures ordered by courts under such rules are more akin to the exercise of disciplinary powers than to the imposition of a punishment for commission of a criminal offence. <u>It is, of course, open to States to bring what are considered to be more serious examples of disorderly conduct within the sphere of criminal law,</u> but that has not been shown*

[10] Application no. 14220/88 – 23rd March 1994.

*to be the case in the present instance as regards the fines imposed upon the applicant (see paragraph 33 above).*

*For these reasons the Court reaches the conclusion that the kind of proscribed conduct for which the applicant was fined in principle falls outside the ambit of Article 6 (art. 6). The courts may need to respond to such conduct even if it is neither necessary nor practicable to bring a criminal charge against the person concerned."* (Emphasis added)

4.5. With regard to the underlined sections above, the Commission would comment that, although all instances of the commission of, and the sentencing for, contempt in the face of the court have up to now been categorised by the Irish courts as criminal in nature, it is open to this Honourable Court to clarify whether certain sanctions (such as exclusion from the courtroom and committal to custody for the remainder of the sitting of the court), fall outside the criminal law and thus are not subject to the provisions of Article 6 of the ECHR. Further examples of this type of sanction are to be found in the judgment of the European Court of Human Rights in ***Putz v. Austria***[11]:

*"37. The Court notes that Article 235 of the Code of Criminal Procedure concerning responsibility for keeping order at hearings provides for the imposition of a fine not exceeding ATS 10,000 or, where essential for maintaining order, a custodial sentence not exceeding eight days...*

*In this respect, the Court notes a number of dissimilarities between the instant case and the Ravnsborg case, in which the amount of the fines could not exceed 1,000 Swedish kronor and the decision to convert them into custodial sentences required a prior hearing of the person concerned. This finding, however, is qualified by three features of the instant case: firstly, as in the Ravnsborg case, the fines are not entered in the criminal record; secondly, the court can only convert them into prison sentences if they are unpaid, and an appeal lies against such decisions (see paragraph 21 above), as it does against custodial sentences*

[11] Application no. 18892/91 - 22nd February 1996

*imposed straight away at the hearing where that course was essential for maintaining order; lastly, whereas in the Ravnsborg case the term of imprisonment into which a fine could be converted ranged from fourteen days to three months, in the instant case it cannot exceed ten days.*

*However real they may be, the dissimilarities, which reflect the characteristics of the two national legal systems, therefore do not appear to be decisive. In both cases the penalties are designed to enable the courts to ensure the proper conduct of court proceedings (see paragraph 33 above).*

*Having regard to all these factors the Court considers, like the Government, that what was at stake for the applicant was not sufficiently important to warrant classifying the offences as 'criminal'."*

4.6. It can be noted that the Strasbourg Court in ***Putz*** found that the imposition of fines and even imprisonment for court management purposes did not bring into play the protections of Article 6 of the ECHR. This might however be seen as a high water mark, and more recently, in ***Pecnik v. Slovenia***[12], the same Court found certain court management procedures which were not classified as criminal in domestic law to be nonetheless subject to Article 6 of the ECHR, due to the possibility of fines being converted into a substantial prison sentences in the absence of procedural guarantees:

*"30. The Court reiterates that the question whether the criminal head of Article 6 applies has to be assessed in the light of three alternative criteria laid down in the Court's case-law, namely the classification of the offence in domestic law, the nature of the offence and the nature and severity of the penalty (see, in particular, Engel and Others v. the Netherlands, 8 June 1976, § 82, Series A no. 22; Weber v. Switzerland, 22 May 1990, §§ 31-34, Series A no. 177; Ravnsborg v. Sweden, 23 March 1994, § 30, Series A no. 283-B; and Putz, cited above, § 31)*

*[...]*

[12] Application no. 44901/05 - 27th September 2012

*34. While the Court does not find it necessary to decide whether in the present case the amount of the fine imposed and the one risked might have by themselves attained a level that made the sanction "criminal", it considers that the risk of conversion into such a substantial prison sentence and the lack of any guarantees attached to the conversion indicated the degree of severity which brought the proceedings in question within the criminal sphere of Article 6."*

4.7. Returning to the present case, the offence of contempt under s.6 of the 1871 Act seems to be classified as a criminal offence, and one which carries with it a possible immediate custodial sentence of imprisonment (as opposed to one where imprisonment can only occur as a result of a failure to pay a fine). Furthermore, there are no procedural safeguards which accompany s.6 of the Act – on the contrary, the section requires that any sentence be imposed *"before the rising of such court"*, which leaves very little time for the preparation of a defence to any charge under the section.

4.8. It is submitted that the offence of contempt under s.6 of the 1871 Act (and the similar offence under s.9 of the 1851 Act) is accordingly one which is covered by Article 6 of the ECHR – i.e. it is closer to the criminal-type sanction in the ***Pecnik*** case than the court management-type sanctions in the ***Ravnsborg*** and ***Putz*** cases[13]. Although the offence of contempt in the face of the court under the common law strictly speaking does not appear to arise in the present case, it would appear that this offence would also be seen as criminal in nature such that Article 6 of the ECHR would apply. However, as discussed above, it may be that certain aspects of the contempt procedure (such as exclusion from the court[14] and committal to custody for the remainder of the sitting of the Court) may be categorised as non-criminal in nature and may allow for immediate action without interfering with Article 6 rights.

---

[13] As discussed elsewhere however, it may be possible to view s.6 of the 1871 Act and s.9 of the 1851 Act as containing both court management sanctions and criminal sanctions.

[14] It should be noted that s.6 of the 1871 Act and s.9 of the 1851 Act expressly provide for exclusion from the court as a sanction, in addition to the possibility of a fine and imprisonment.

4.9. The Court of Appeal recently in ***Walsh v. MJE***[15] appeared to acknowledge a distinction between a measure excluding the person from the courtroom and a more serious sanction for contempt:

*"A presiding judge must be afforded very wide discretion as to how to deal with such situations, and has a wide discretion to make a judgment call as to whether the mere expulsion from court of the individual in question is sufficient and appropriate or whether it is necessary to impose a more severe penalty, including imprisonment. Ultimately, the decision as to how best to proceed is a matter which ought to be left to the discretion of the presiding judge."*

4.10. Given that fines for disruption of proceedings, and even imprisonment in default of payment of such fines, have been seen by the Strasbourg Court in certain circumstances as not covered by Article 6 of the ECHR, as in ***Ravnsborg*** and ***Putz***, it seems possible for certain existing immediate sanctions for contempt in the face of the court to be seen as not conflicting with the ECHR, notwithstanding the lack of time given to the alleged contemnor to consider the matter and prepare a defence. In this regard, it is relevant to note that O'Higgins J. in ***State (DPP) v. Walsh***[16] appeared to view sanctions imposed to protect the authority and dignity of the court as not being primarily punitive in nature:

*"With reference to the submission that a need for swift action may justify the exercise of summary jurisdiction in relation to criminal contempts committed in facie curiae or in relation to constructive contempts of a pending trial but would not do so in the case of the contempt of scandalising a court, I have already indicated that I think the distinction implicit in that submission is fallaciously drawn. In my view, the basis for this jurisdiction is the protection of the proceedings of the Courts—whether it be in relation to litigation at hearing or pending, or in relation to litigation concluded where the justice and authority of the court and, therefore, of its decision is questioned by baseless and malicious charges of impropriety and misconduct. In all these cases the Courts must have the power to act in protection of the justice which they dispense and to do so*

[15] [2017] IECA 106
[16] [1981] 1 IR 412.

*quickly. The primary purpose of such action is not to punish those whose criminal conduct has endangered the administration of justice. It is to discourage and to prevent the repetition or continuance of conduct which, if it became habitual, would be destructive of all justice."*[17] (Emphasis added)

4.11. If certain immediate sanctions for contempt were categorised by this Honourable Court as disciplinary rather than criminal, this would be the first step in bringing their imposition outside of the scope of Article 6 of the ECHR, in accordance with the test set out by the Strasbourg Court in ***Engel v. Netherlands*** and later summarised as follows in ***Özturk v. Germany***[18]:

*"50. Having thus reaffirmed the "autonomy" of the notion of "criminal" as conceived of under Article 6 (art. 6), what the Court must determine is whether or not the "regulatory offence" committed by the applicant was a "criminal" one within the meaning of that Article (art. 6). For this purpose, the Court will rely on the criteria adopted in the above-mentioned Engel and others judgment (ibid., pp. 34-35, § 82). The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6 (art. 6), to the ordinary meaning of the terms of that Article (art. 6) and to the laws of the Contracting States."*

4.12. In ***Kyprianou v. Cyprus***, the European Court of Human Rights applied the ***Engel*** test and found the contempt in that case was subject to Article 6 of the ECHR. The Second Section commented as follows at paragraph 31 of the first instance judgment (later upheld by the Grand Chamber):

*"The offence was classified in domestic law as criminal, it was not confined to the applicant's status as a lawyer, the maximum possible sentence was one month's imprisonment and the sentence actually imposed on the applicant was 5*

[17] *Ibid*, at 427-428.
[18] Application no. 8544/79 - 21st February 1984.

*days' imprisonment (see Ezeh and Connors v. the United Kingdom [GC], nos. 39665/98 and 40086/98, §§ 82-86, ECHR 2003-X). Therefore, the requirements of Article 6 of the Convention in respect of the determination of any criminal charge, and the defence rights of everyone charged with a criminal offence, apply fully in the present case."*[19]

4.13. In the present case, the Appellant was sentenced under s.6 of the 1871 Act, which provides for a potential sentence of 7 days' imprisonment. The Strasbourg Court, in ***Mikhaylova v. Russia***[20] indicated that an element of custody makes it more likely that a particular regime is criminal in nature and therefore subject to Article 6 of the ECHR:

*"66. As a matter of principle, the Court attaches particular importance to any form of deprivation of liberty when it comes to defining what constitutes the "criminal" sphere (see Ziliberberg v. Moldova , no. 61821/00, § 34, 1 February 2005)."*

4.14. In ***DPP v. Independent Newspapers***[21], Hardiman J. stressed the criminal nature of the imposition of fines and imprisonment for contempt of court, stating *"There is in my view no answer to the point made by Palles C.B.: 'Now no-one will contend that the jurisdiction to fine and imprison is not essentially criminal'"*[22].

4.15. It should be noted however that both s.6 of the 1871 Act and s.9 of the 1851 Act provide for sanctions for a contemnor other than being fined and sentenced to imprisonment, namely (a) being removed from the courtroom; and (b) being taken into custody until the court rises.

4.16. The Commission respectfully submits that the imposition of a seven day sentence of imprisonment, as occurred in the present case, is a sufficiently serious

---

19 Application no. 73797/01 – Second Section, 27th January 2004.
20 Application no. 46998/08 - 19th November 2015.
21 [2008] 4 IR 88, at 94.
22 It is submitted that the persuasiveness of this statement is unaffected by the fact that Hardiman J . was in the minority on the procedural point in that case.

sanction such that it should be seen as being within the criminal sphere, and thus subject to Article 6 of the ECHR. The Commission further submits that the imposition of this sentence following an effectively immediate disposal of the contempt issue, without any time given for the Appellant to consider the matter, compose himself and, if appropriate, prepare a defence or consider apologising, constituted a breach of the Appellant's right *"to have adequate time and the facilities for the preparation of his defence"* under Article 6(3)(b) of the ECHR.

4.17. The Commission takes the view that certain powers given to the District Court under the 1871 and 1851 Acts may be seen as exercisable without bringing into play the provisions of Article 6. Thus, where a disruption is taking place and/or a person has insulted the judge or outrageously attacked the administration of justice, and a District Judge accordingly needs to restore order and perhaps maintain the dignity of the court, it is submitted that the removal of that person from the court, following the giving of appropriate warnings, and even the committal of the person to custody (having failed to comply with said warnings) until the end of the court sitting can be seen as matters which are more disciplinary than criminal. If this is so, there is no requirement for a delay in the imposition of the sanction to allow a defence to be prepared, provided that there is a necessity for immediate action (although basic fairness will still be required[23]).

4.18. It is arguable that the structure of both s.6 and s.9 appears to support the view that the sanctions of removal and taking into custody on the one hand and imprisonment and fining on the one hand are on different sides of the disciplinary/criminal line.

4.19. Although it appears that the present case does not concern a finding of contempt contrary to common law, it is submitted that there is no reason in

[23] In ***Fitzgerald v. O Donnabháin*** [2017] IESC 49, this Honourable Court recently granted leave to bring judicial review proceedings challenging the temporary committal of the applicant to custody for contempt in the Circuit Court, which the applicant in his *ex parte* application for leave alleged occurred in breach of fair procedures. O'Donnell J., giving judgment for the Court, stated: *"The power to commit a party or a member of the public for contempt of court is unique, and in my view if there is an allegation made that fair procedures have not been followed before a person has been committed, deprived of their liberty, and then returned to court in handcuffs, then it should at least be investigated. Here on the appellant's case at least, he was not given any warning of the risk of a finding that he was in contempt or any opportunity of contesting the charge".*

principle why the above reasoning should not also apply to the equivalent court management-type sanctions and criminal-type sanctions available following a finding of contempt contrary to common law in the District Court, in the Circuit Court and in the Superior Courts.

4.20. As regards due process rights under Article 38, it is submitted that any potential conflicts with the imposition of the immediate contempt sanctions of removal from the court and committal to custody for the remainder of the court sitting can be resolved in a manner analogous to that discussed above in relation to Article 6 of the ECHR – i.e. these disciplinary sanctions can be seen as outside of the sphere of criminal law, and thus the criminal due process rights of Article 38 of the Constitution do not apply to them.

4.21. In summary, the Commission respectfully submits that the due process rights provided for by Article 38[24] of the Constitution apply in respect of any charge of contempt which has as a possible result the imposition of a fine and/or a sentence of imprisonment. Similarly, it is submitted that the rights of the defence provided by Article 6 of the ECHR apply in such circumstances. However, the Commission takes the view that neither Article 38 of the Constitution nor Article 6 of the ECHR apply in respect of an instance of contempt which results only in the court management sanctions of either removal from the courtroom or committal to custody for the remainder of the court sitting. The distinction between court management and criminal sanctions is accordingly crucial.

## 5. APPLICATION OF CONSTITUTIONAL AND ECHR PROTECTIONS TO THE PRESENT CASE

5.1. In line with the views expressed by the Appellant and the DPP in relation to Article 6 of the ECHR, the Commission agrees that Article 6 applies in the present case, particularly in circumstances where there has been the imposition of

[24] Since the charge in the present case was one triable only in the District Court, the Commission in these submissions not addressed the contentious issue as to whether the guarantee in Article 38.5 of a jury trial in respect of non-minor offences applies in cases of contempt of court. However, the Commission would be happy to address the Court on this issue if necessary.

a custodial sanction. In its judgment in the case of ***Kyprianou v. Cyprus***[25], discussed further below, the Grand Chamber of the European Court of Human Rights found that *"the requirements of Article 6 of the Convention in respect of the determination of a criminal charge, and the defence rights of everyone charged with a criminal offence"* applied in respect of the contempt in the face of the Court under examination in that case.

5.2. The statutory and common law offences of contempt which allow for the imposition of a fine and/or a sentence of imprisonment in this jurisdiction would, *prima facie*, appear to be ones which are covered by Article 6.

5.3. The main rights protected by Article 6 which arise for consideration in the present case would appear to be:

(a) the Appellant's right to be tried by an *"independent and impartial tribunal"* (Article 6(1)); his right *"to be informed promptly,...and in detail, of the nature and cause of the accusation against him"* (Article 6(3)(a);
(b) his right *"to have adequate time and the facilities for the preparation of his defence"* (Article 6(3)(b));
(c) his right *"to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require"* (Article 6(3)(c)); and
(d) his right *"to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"* (Article 6(3)(d)).

5.4. It is submitted that all of the said rights should be seen as also being protected by the guarantee of due process provided by Article 38.1 of the Constitution.

***Summary trial as distinguished from immediate trial***

[25] Application no. 73797/01 – Grand Chamber, 15th December 2005, at paragraph 61.

5.5. It is submitted that the power to try a person summarily for contempt in the face of the Court does not necessarily lead to the conclusion that a summary trial must take place immediately or even on the same day.

5.6. As regards what might be understood by *"summary"*, it can be noted that the Privy Council in ***Rajkumar v. Lalla***[26], in finding that judicial review is not a *"summary proceeding"*, commented as follows:

*"In the absence of any applicable statutory definition of 'summary proceeding' their Lordships take the view that in essence a summary proceeding is one which can be distinguished from a more formal proceeding such as occurs in the distinction between trials on indictment in the criminal law and summary proceedings where no jury trial with its attendant procedure is required but the judgment is committed to another tribunal with the expectation that the proceedings will take less time and that they will not require the same elaboration of procedure which is attendant on a jury trial.*

5.7. The concepts of summary procedure and what might be termed immediate or same-day procedure have arguably become somewhat conflated in the context of contempt in the face of the Court. O'Higgins J. in ***State (DPP) v. Walsh***[27] explained the concessions of the defendants in that case as follows:

*"[The Defendants] concede that a summary jurisdiction exists in respect of criminal contempts committed in facie curiae . They make a similar concession in respect of such constructive contempts as impede, threaten or endanger a fair trial of pending proceedings. In respect of such contempts they say that the Courts are bound to act quickly in the interests of justice, and that this requirement for urgent action is the source of, and basis for, a summary jurisdiction."*

5.8. The Commission respectfully submits that, even in cases where a criminal prosecution for contempt in the face of the court is seen as merited, it is possible

[26] [2001] UKPC 53
[27] [1981] 1 IR 412

for a court to take swift action initially to restore order or protect the dignity of the Court through the use of court management sanctions, before going on to afford the alleged contemnor some time to consider the matter of which he or she is being accused, to decide how to deal with the accusation (for example, whether to apologise) and to obtain legal representation if so desired.

5.9. In the present case, an issue for this Honourable Court to decide is whether there was a necessity for the Appellant to be tried and sentenced immediately. The Respondent had already exercised his power to have the Appellant removed from the courtroom, in order to prevent further disruption of court proceedings. In circumstances where it was then understood by the Respondent that the Appellant had directed the statement *"how crooked you are!"* at *him*, an issue for this Honourable Court to decide is whether the Respondent had reasonable grounds for suspecting that he had been *"wilfully insulted"* (to use the terminology of s.6 of the 1871 Act) and whether the Respondent was thus justified in accusing the Appellant of contempt in the face of the Court.

5.10. Where the Respondent went on to sentence the Appellant to the maximum sentence statutorily permissible it is respectfully submitted that, in accordance with the due process rights referred to at paragraphs 5.3 and 5.4 above, the Appellant should have been afforded an opportunity to consider the matter and prepare his defence (or his apology/plea in mitigation). He could perhaps have been bailed to return to court on another date to face the charge of contempt in the face of the court. This would necessarily have been a charge of contempt in the face of the court contrary to common law, without the temporal restriction under statute.

5.11. It is submitted that a more formal and less accelerated procedure than the one which took place here would be called for before a custodial sentence is imposed. It appears to the Commission that the trial and sentence of the Appellant effectively occurred immediately, and that as a consequence it is arguable that both were in breach of the Applicant's right to be afforded adequate time and facilities to prepare a defence under Article 6(3)(b) of the ECHR and the

equivalent due process rights protected by Article 38.1 of the Constitution. Also resulting from the brevity of the procedure would be potential breaches of the protections provided for by Article 6(1), Article 6(3)(a), Article 6(3)(c), and Article 6(3)(d), which are summarised in paragraph 5.3 above.

5.12. In relation to the right to adequate time and facilities to prepare a defence, the European Court of Human Rights stated as follows in ***Mayzit v. Russia***[28]:

*"78. Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the outcome of the proceedings. The provision is violated only if this is made impossible (see Can v. Austria, no. 9300/81, Commission's report of 12 July 1984, Series A no. 96, § 53).*

5.13. In that case, no violation of Article 6(3)(b) was found to have taken place as the applicant had 2 months to prepare his defence, and it had been possible, although difficult, to do this while in prison. In contrast, a violation of Article 6(3)(b) was found to have taken place in ***Ocalan v. Turkey***[29], where the Strasbourg Court found as follows:

*"142. The Grand Chamber therefore considers that the present case is distinguishable from Kremzow, in which the applicant had twenty-one days in which to examine forty-nine pages, in contrast to Mr Öcalan, who had twenty days in which to examine a case file containing some 17,000 pages."*

5.14. References to specific timescales and volumes of documentation are perhaps of limited assistance in gauging what would have been reasonable in the present case, which was one of comparatively low complexity, with no relevant documentation in relation to the contempt in the face of the court charge.

[28] Application no. 63378/00 – First Section, 20th January 2015
[29] Application no. 46221/99 – Grand Chamber, 12th May 2005.

Nonetheless, it is submitted that the fact that the Appellant was required to defend the charge effectively immediately amounted to a breach of Article 6(3)(b) of the ECHR in this case, as well as a breach of the equivalent protection provided by Article 38.1 of the Constitution. The question of whether other protections such as the right to legal assistance and the right to examine witnesses were in fact breached in this case would perhaps require a deeper engagement with the facts than is appropriate for the Commission to carry out in these submissions.

5.15. The Commission wishes to stress that it is not expressing a view as to whether the Appellant was guilty of contempt, or whether the sentence of 7 days' imprisonment was appropriate, but rather is seeking to comment on the manner in which the trial, conviction and sentence for contempt took place in the present case.

***Trial by a different judge***

5.16. A separate, though connected, issue which arises as a result of the manner in which the trial and sentence took place in the present case is the question of whether it was permissible under the Constitution and the ECHR that the Respondent was the judge who tried and sentenced the Appellant, in circumstances where the Appellant was seen as having *"been abusive to the court and [having] accused the court of being corrupt"*.

5.17. Article 6(1) of the ECHR provides for a right to *"a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*. As discussed in the submissions of the Appellant and of the DPP, the Grand Chamber of the European Court of Human Rights considered the application of this provision to contempt in the face of the court proceedings in ***Kyprianou v. Cyprus***[30].

5.18. It was held by the Strasbourg Court that Article 6(1) required both subjective and objective impartiality. Neither was found to be present in that case, in

[30] Application no. 73797/01 – Grand Chamber, 15th December 2005.

circumstances where the members of the Limassol Assize Court had indicated that they had been "insulted" by the comments of Mr Kyprianou, who was a lawyer involved in the proceedings before them. The Assize Court had found:

*"The judges as persons, whom Mr Kyprianou has deeply insulted, are the least of our concern. What really concerns us is the authority and integrity of justice. If the court's reaction is not immediate and drastic, we feel that justice will have suffered a disastrous blow."*[31]

5.19. The Grand Chamber commented as follows, in finding that the actions of the Assize Court[32] had failed the objective test for impartiality:

*"127.The present case relates to a contempt in the face of the court, aimed at the judges personally. They had been the direct object of the applicant's criticisms as to the manner in which they had been conducting the proceedings. The same judges then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction, in this case a term of imprisonment. In such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench (see Demicoli v. Malta, judgment of 27 August 1991, Series A no. 210, pp. 18-19, §§ 41-42)."*

5.20. The Grand Chamber went on to find that the actions of the Assize Court also failed the subjective test for impartiality:

*"131. Although the Court does not doubt that the judges were concerned with the protection of the administration of justice and the integrity of the judiciary and that for this purpose they felt it appropriate to initiate the instanter summary*

---

[31] *Ibid*, at paragraph 18.

[32] It should be noted that the Grand Chamber in in ***Kyprianou*** did not embark on a general examination of contempt in common law countries (see para 125 of the judgment), and stressed that what was at issue was the particular procedure used in that case.

*procedure, it finds, in view of the above considerations, that they did not succeed in detaching themselves sufficiently from the situation.*

*132. This conclusion is reinforced by the speed with which the proceedings were carried out and the brevity of the exchanges between the judges and Mr Kyprianou."*[33]

5.21. It is important to recall in the context of the present case that the legislative provision pursuant to which the Appellant was tried and sentenced does not allow for the trial and sentence to be carried out by a judge other than the judge who witnessed the contempt, and who possibly was on the receiving end of it: as noted above, s.6 of the 1871 Act requires that the sentence be imposed *"before the rising of such court"*[34].

5.22. In ***State (DPP) v. Walsh***, Henchy J. noted the potential problem regarding impartiality, but found that there was essentially no way around this:

*"It may be said that it is short of the ideal that a judge may sit in judgment on a matter in which he, or a colleague, may be personally involved. Nevertheless, in such matters judges have to be trusted, for it is they and they alone who are constitutionally qualified to maintain necessary constitutional standards."*[35]

5.23. In ***Robertson v. HM Advocate***[36], the Scottish High Court of Judiciary emphasised the distinction between two different types of contempt in the face of the Court – the first is where the disruptive/abusive conduct is directed at the judge personally and the second is where it such conduct is directed at the administration of justice. The High Court of Judiciary found that the ***Kyprianou*** judgment did not preclude a judge who had witnessed the latter type from dealing with that contempt him or herself in an objectively impartial way.

---

[33] *Kyprianou v Cyprus* Application No. 73797/01 – Grand Chamber, 15th December 2005, at 131 – 132.
[34] As does s.9 of the 1851 Act, which is almost identical.
[35] [1981] 1 IR 412, at 440.
[36] [2007] HCJAC 63

5.24. Given that the Committal Warrant in the present case records the Appellant as having committed the contempt *"by being abusive to the court and he accused the court of being corrupt"*, it seems difficult to view this case as one where the alleged disruptive/abusive conduct was not interpreted by the judge as being directed at the judge personally[37]. If this Honourable Court is of this view, it is submitted that, on the basis of the ***Kyprianou*** decision, even as qualified by its interpretation in ***Robertson***, the conviction and sentencing of the Appellant by the Respondent must be seen as failing the objective test for impartiality.

5.25. Notwithstanding the brevity of the procedure used, the Commission does not see any evidence arising from the agreed facts which is indicative of a lack of subjective impartiality on the part of the Respondent, and it notes the view of the European Court of Human Rights that *"the personal impartiality of a judge must be presumed until there is proof to the contrary"*[38].

5.26. As regards the wider question of whether and when a judge who has witnessed an alleged contempt may proceed to personally try and sentence the perceived contemnor, the Commission submits that a similar approach should be taken to that proposed in relation to the issue of immediate trial above – i.e. where the sanctions being imposed are for court management purposes, such as removal from the court and committal to custody for the remainder of the sitting of the Court, this is not categorised as criminal in nature and neither Article 6(1) nor Article 38.1 should be seen as applying. There does not appear to be anything wrong in principle with a judge imposing disciplinary sanctions of this type for a contempt which he or she has witnessed, even where the judge has been personally insulted. Indeed, an immediate disciplinary sanction will often be needed to restore order and maintain the dignity of the Court.

---

[37] The Commission expresses no view on whether the Appellant was in fact directing his words at a Garda rather than at the Respondent– it is sufficient for the present discussion of the issues that the Respondent interpreted the words as having been directed at him personally.

[38] ***Kyprianou***, at paragraph 119.

5.27. In relation to the criminal sanctions of fines and imprisonment however[39], the Commission submits that in light of the foregoing caselaw, the impartiality requirements of Article 38.1 and Article 6(1) require that the trial and sentencing of the alleged contemnor be carried out by a different judge in circumstances where the contempt in the face of court has been aimed at the judge personally. In such cases, it is conceivable that a judge might fail a subjective or objective test for impartiality, and so would not be best placed to try and sentence the alleged contemnor. The trial and sentencing of the alleged contemnor by a different judge would require practical issues relating to legal aid and the potential involvement of the DPP as prosecutor to be examined, but it is submitted that this would be in accordance with the dictates of the proper administration of justice, including impartiality. Indeed, in England and Wales, Part V of the detailed Practice Direction 81 on Applications and Proceedings in Relation to Contempt of Court[40] provides"4.4 If there is a risk of the appearance of bias, the judge should ask another judge to hear the committal application"

5.28. Given that, on the Commission's interpretation as set out above, court management sanctions of removal from the courtroom and committal to custody for the remainder of the sitting are available to the original judge to restore order and protect dignity, there does not appear to be any necessity for trial and sentencing for contempt to also be carried out by that judge. The criminal sanctions of fines and imprisonment call for the protection of Article 38 and Article 6. Any restrictions on due process rights should be proportionate and so should only be imposed insofar as is absolutely necessary.

5.29. There is certainly a logic to the view that *"the person by far best placed to determine whether a contempt has occurred is the judge who was present"*[41]. However, it is submitted that the potential advantage of the particular judge

---

[39] The sanction of committal to custody for the remainder of the sitting of the Court is not intended to be included as "imprisonment" in this context.

[40] Accessible at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-81-applications-and-proceedings-in-relation-to-contempt-of-court/practice-direction-81-applications-and-proceedings-in-relation-to-contempt-of-court#IDAYGLOC The Consolidated Criminal Practice Direction - Criminal Procedure Rules in England and Wales deals with contempt in the face of the Magistrates' Court in particular at V.54.12 and provides "If the offender's conduct was directed to the justices, it will not be appropriate for the same bench to deal with the matter".

[41] Per Noonan J. in ***Ryan v. Governor of Mountjoy Prison*** [2017] IEHC 207.

having witnessed the events must give way to the requirements of objective impartiality. Furthermore, the availability of the Digital Audio Recording (DAR) of all court proceedings appears to be a highly significant technological advance in relation to the question of whether it is practically possible for a judge to decide whether a contempt in the face of the court was committed in the court of different judge. The argument that a judge who has not personally witnessed alleged disruptive or abusive behaviour cannot properly decide whether a contempt in the face of the court was committed (traditionally because *"[t]he arid pages of a transcript seldom reflect the atmosphere of a trial"*[42]) must surely be seen as weakened by the advent of the DAR. To give an example, the DAR appears to have been of particular assistance to the Court of Appeal when finding that the two week sentence of imprisonment for contempt which had been imposed on the applicant in ***Walsh v. MJE***[43] was proportionate, as indicated by Mahon J.:

*"6. Later in the day the Walsh repossession proceedings were resumed. There followed a period in which the learned Circuit Court judge was continually interrupted and shouted down by unknown persons in what might reasonably be described as an atmosphere of near anarchy. This is very vividly illustrated by listening to the DAR. This very heated atmosphere must have been extremely difficult, unpleasant, disruptive and indeed intimidating for the judge, court staff and members of the public not engaged in such behaviour."*

## 6. ***MENS REA***

6.1. The statutory provision under which the Appellant was convicted in the present case provides for sanctions to be imposed *"if any person shall <u>wilfully insult</u> any justice...or shall commit any other contempt*" (emphasis added)[44]. These appear to refer to two instances of contempt, with the former having an express requirement for intention to be shown, and the latter being silent as to *mens rea*.

---

42 As stated by McCarthy J. in ***Hay v. O'Grady*** [1992] 1 IR 210 at 217 (although not in the context of a contempt trial).

43 [2017] IECA 106

44 Section 6 of the Summary Jurisdiction (Ireland) Act 1871.

6.2. It is not entirely clear from the Committal Warrant whether the Appellant was found to have wilfully insulted the Respondent, to have committed any other contempt, or both. It can be noted that Form 25.9 of Schedule B of the District Court Rules[45] contains options of *"*(wilfully insulted me)"* and *"*(committed a contempt of this Court)"*, with a direction to *"delete words which are not applicable"*, and the Respondent in this case deleted *"wilfully insulted me"*. The fact that the *"wilfully"* option was not used leaves an unsatisfactory uncertainty as to whether *mens rea* was seen by the Respondent as being required for a conviction for contempt in the face of the court under the 1871 Act.

6.3. Given that the ground to which this appeal is confined relates to the *"manner"* in which the finding of contempt was made, a discussion of this issue of *mens rea* would appear to be outside the scope of the appeal, and the Commission makes no comment on whether in its view the Appellant intended to commit a contempt, was reckless as to whether a contempt might be committed or otherwise. However, insofar as it may be of assistance to the Court, the Commission notes that McKechnie J. in ***Murphy v. BBC***[46] commented at paragraph 56 of his judgment *"I am not satisfied that the present state of Irish law requires the establishment of mens rea as a necessary ingredient of this offence"*, while he also referred to the more equivocal comments of Keane J. in ***Kelly v. O'Neill***[47], where Keane J. stated:

*"While undoubtedly the generally accepted view of the law has hitherto been that the offence is absolute in its nature and does not require the establishment of mens rea, one certainly could not exclude the possibility that, in the absence of any modern Irish authority, the courts in this country might have come to the conclusion that mens rea was a necessary ingredient of the offence."*

---

[45] Accessible at http://www.courts.ie/rules.nsf/lookuppagelink/CAF482BB77BADD3480257651004BCB2D?opendocument&l=en

[46] [2005] 3 IR 336

[47] [2000] 1 IR 354, at 380.

6.4. Although McGovern J. in ***AIB v. McQuaid***[48] recently made an *obiter* finding interpreting the ***Murphy*** and ***Kelly*** cases as indicating that *mens rea* must be shown, the Commission would respectfully comment that it appears that McGovern J. may have been in error on this point[49].

6.5. Given that convictions for contempt of court at common law carry with them the possibility of substantial fines and lengthy sentences of imprisonment, the Commission respectfully takes the view that the principle of proportionality should apply to the consideration of whether, for practical reasons, strict liability is necessary in relation to certain types of contempt[50].

6.6. Different considerations would appear to apply in cases of the imposition of court management sanctions only and the Commission submits that intention to commit a contempt (or recklessness as to whether a contempt might be committed) need not be shown before a court can order that a person be removed from the courtroom or committed to custody for the remainder of the court sitting. Attributing strict liability in such circumstances would seem to be justified by the requirement for immediate action in order to preserve the administration of justice.

6.7. In circumstances where even the statutory offences of contempt under the 1851 and 1871 Acts are not fully clear as to when *mens rea* will need to be shown, it appears that the relevance of *mens rea* in the context of contempt in the face of the court would benefit from clarification, and that the present uncertainty is unsatisfactory.

## 7. CONCLUSION

---

48 [2017] IEHC 485

49 In particular in relation to the judgment of McKechnie J. in ***Murphy***, as the extract from that judgment quoted by McGovern J. at paragraph 31 of his judgment in ***McQuaid*** is from a section where McGovern J. was setting out the submissions which had been made by the respondent, and McKechnie J. in fact had gone on to take the opposite view in his conclusions on the point.

50 The Commission has taken the view that an examination of whether *mens rea* should be required in respect of each of the various types of contempt is outside the scope of these submissions and, in any event, does not appear to be covered by the ruling of Clarke J. as to the question for this Court on this appeal.

7.1. With regard to the Charter of Fundamental Rights of the European Union, the Commission agrees with the submission of the DPP that same has no applicability in the present case, which does not concern the implementation of EU law (see Article 51(1) of the Charter).

7.2. In relation to the question of whether the manner of the trial and sentencing of the Appellant in the present case was in compliance with the Constitution and the ECHR, the Commission respectfully submits that it was not, primarily due to the fact that (a) the Appellant does not appear to have been provided with adequate time to consider the matter and choose whether to prepare a defence, apologise or otherwise; and (b) there appears to have been a lack of objective impartiality, if this Honourable Court takes the view that the judge who felt he had been abused and accused of corruption was the same judge who tried and sentenced the Appellant.

7.3. Wider issues which this Honourable Court might consider, and which the Commission has sought to provide assistance on above, include:

(a) Whether the provisions of the 1851 and 1871 Acts relating to contempt in the face of the court can be applied in a manner compatible with the Constitution and the ECHR, given (i) the temporal restriction contained therein and (ii) the resulting necessity to have the matter heard by the same judge who witnessed the contempt;

(b) Whether the distinction between court management sanctions and criminal sanctions might allow the said provisions of the 1851 and 1871 Acts to be used for limited, non-criminal purposes;

(c) If the said statutory provisions can no longer be used, to what extent the procedure for trial and conviction in respect of the *common law* offence of contempt in the face of the court might be applied in the District Court to replace the statutory procedure[51];

[51] With the resulting need to amend Order 25, Rule 5 of the District Court Rules.

(d) More generally, whether the appropriate procedure in all courts for trial and conviction in respect of the common law offence of contempt in the face of the court needs to be clarified in order to ensure compliance with the protections afforded by Article 38 of the Constitution and Article 6 of the ECHR; and

(e) In what circumstances, if any, *mens rea* need be shown before a person can be convicted of contempt in the face of the court.

7.4. The Commission is happy to address these and any other issues which might be raised by this Honourable Court at the hearing of the matter.

**RÓISÍN LACEY SC**
**ANTHONY HANRAHAN BL**
27th October 2017

On behalf of the Irish Human Rights and Equality Commission, acting as Amicus Curiae

*Word Count:8,905*[52]

[52] This word count does not include footnotes.