RECEIVED
12 MAR 2019
OFFICE OF THE SUPREME COURT

THE SUPREME COURT

Record No. S:AP:IE:2018:000079

Between

MICHAEL SWEENEY

Respondent

and

IRELAND, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellants

And

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

SUBMISSIONS ON BEHALF OF THE AMICUS CURIAE

Introduction

1. The Irish Human Rights and Equality Commission (the 'Commission') has been joined as *amicus curiae* in these proceedings, pursuant to s.10 (2)(e) of the Irish Human Rights and Equality Commission Act 2014.

2. This submission firstly considers whether a genuine fear of self-incrimination is, in law, a reasonable excuse for failing to provide information about the criminal activities of others. The submission then addresses comparative examples from other jurisdictions and considers whether S.9(1)(b) of the Offences Against the State Act 1939-1998 (hereafter 'S.9(1)(b)') offers sufficient protection to persons who have relevant information to disclose, but who fear self-incrimination by disclosing it. Lastly, the Commission addresses the issue of whether these proceedings are premature.

3. The Commission concludes that the risk of self-incrimination does amount to a lawful basis to fail to provide material assistance to Gardaí. It respectfully submits that the impugned section is unconstitutional, due to the lack of safeguards therein to protect the privilege against self-incrimination and the overall uncertainty as to the ambit of the provision and what it criminalises. The Commission also submits that these proceedings are not premature.

Fear of self-incrimination, as a defence to a charge of withholding information

4. There is a dispute between the parties in respect of whether the Garda interviews with the Respondent would be adduced in evidence against him at trial. The Appellants say as follows in their submissions at paragraph 57:

> *'The case set out in the book of evidence does not include those interviews. Nor indeed was he actually obliged by law to answer any of the questions put to him. The charge is that he did not give information, not that he failed to answer questions. The respondent could have given the information at any time irrespective of whether he was questioned or not.'*

5. Given its position as *amicus curiae*, the Commission does not wish to comment on the factual issue of what evidence could be adduced against the Respondent at trial. However, the Commission's concern about the impugned section is broader than the possibility that 'no comment' interviews would be adduced to prove that the Respondent withheld information about the involvement of others in the offence. Rather, it appears to the Commission that a significant unfairness arises for persons in the position of the Respondent by virtue of the lack of clarity about the meaning of S.9(1)(b) and lack of safeguards therein. This unfairness is not confined to a formal or informal interview process, but arises from the moment that an affected person apprehends that they have information about a criminal offence involving other persons, and fears that they might subject themselves to criminal charges by coming forward.

6. It would appear that the Respondent was a suspect in the death of Tom Ward from a very early stage. Three days after the death of Mr Ward, the Respondent was informally questioned by Gardaí. He would therefore have been on notice of his status as a potential witness and, it would appear, as a suspect. It is submitted that under Article 38.1 of the Constitution and under Article 6 ECHR, the Respondent had from that time at least, the privilege to remain silent in respect of factual matters that could potentially incriminate him.

7. There does not seem to be any principled reason, however, to confine the privilege to a situation where the Gardaí have expressly sought relevant information from a potential witness or nominated them as a suspect in the substantive offence. Even if they are never approached by the Gardaí as a witness or suspect, an affected person who fears self-incrimination faces a dilemma. This dilemma arises due to the lack of certainty in respect of whether the privilege against self-incrimination constitutes a 'reasonable excuse' under the section.

8. While the Appellant emphasises that the impugned provision requires persons to come forward with relevant information, rather than requires them to answer particular questions posed by the Gardaí, that appears to be a distinction without a difference. It is submitted

that if a person fears the risk of self-incrimination by reason of communicating with the Gardaí, then the privilege against self-incrimination arises.

9. The Commission agrees with the Respondent's analysis that the impugned section mandates a form of 'compelled speech'. The Appellants submit that since the privilege against self-incrimination is not absolute, a person can be compelled, on pain of criminal sanction, to come forward and volunteer information about the involvement of other persons in serious crimes, even if that information might incriminate them. Relying on the decision of this Honourable Court in *Heaney* and on a House of Lords case, *Green Environmental Industries*[1] the Appellants submit that the only absolute prohibition in respect of coercive questioning is where the answers are adduced at trial to prove a criminal offence.

10. The Appellants say as follows at paragraph 58 of their submissions:

> *'Following the decision of the House of Lords in Green Environmental Industries it appears to be the position that compulsory question powers are not in themselves necessarily objectionable under the ECHR. Rather, what may be objectionable and lead to argument and submission before a trial Judge, is when use is made at trial of answers received pursuant to compulsory questioning powers. If that is so, then there can be no objection under Article 6 to provisions under which it is the obligation of an individual to inform authorities of relevant information relating to the commission of crime by another person.'*

11. It is respectfully submitted that this summary of the ECHR case law is inaccurate. Cases such as *Funke v France*[2] and *Heaney & McGuinness v Ireland*[3] show that coercive questioning can breach Article 6, even if the compelled answers are not subsequently adduced at trial. In both of those case, the applicants were subjected to criminal sanction for failing to provide the information sought by the authorities. They failed to answer and so no evidence was adduced against them in a subsequent trial, but the European Court of Human Rights ('ECtHR') nevertheless found a breach of Article 6.

12. More recently, in cases such as *Jalloh v. Germany*[4] and *O'Halloran and Francis v. the United Kingdom*[5], the ECtHR has applied a balancing test that allows for a proportionality assessment of sorts. But, it is clear that only the most circumscribed powers of compulsion will pass the balancing test, such as to amount to a permissible interference with the right to silence under Article 6 ECHR. In examining whether a procedure has extinguished the

---

[1] [2001] 1 All ER 773.
[2] [1993] 16 EHRR 297.
[3] (1996) 23 EHRR 313.
[4] (2007) 44 EHRR 32.

[5] Application nos. 15809/02 and 25624/02, 29 June 2007.

very essence of the privilege against self-incrimination, the ECtHR will have regard, in particular, to the following elements: the nature and degree of compulsion; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.

13. There have been instances where the ECtHR has concluded that coercive investigative techniques are permissible, for example: following procedural safeguards during questioning, the use at trial of inferences from silence[6] to corroborate other evidence, where the facts clearly call for an explanation; requests to the owner of a car for the identity of the driver, on an occasion when the car broke the speed limit[7]; the gathering of inculpatory evidence which exists independently of the will of the accused, such as DNA and fingerprints[8].

14. The Appellants seek to distinguish the judgment of the ECtHR in *Heaney* on the basis that the ECtHR had operated under the assumption that information gleaned under S.52 of the Offences Against the State Act ('S.52 OASA') was used in evidence to prove criminal offences and found the section to be objectionable on that basis. While the determinative factors relied on by the ECtHR in *Heaney* are not elaborated on in great detail in that judgment, it is notable that the Court expressly followed its earlier decision in *Funke v France*, where there had been no use of the compelled information in a subsequent criminal trial. Additionally, the safeguards mooted by the Irish Government in *Heaney* were rejected by the Court as insufficient to mitigate the onerous nature of the coercive power: the choice under the section was simply to provide the information or else face jail.

15. It might be noted that while the history of S.52 OASA was that coerced answers yielded through questioning under the section had only rarely been used[9] to ground a criminal case, that may be due to the fact that persons questioned under the section would invariably have refused to answer if the answer was liable to result in a serious criminal charge, rather than a summary one.

16. In the subsequent case of *O'Halloran and Francis v UK,* where the balancing test was expressly applied, the ECtHR referred back to the S.52 OASA power at issue in *Heaney* as being an unacceptably broad interference with the right to silence, in contrast to the narrow regulatory requirement which was at issue in that case. This tends to support an interpretation of *Heaney* that the relatively broad subject-matter of the enquiry was part of the reason why S.52 OASA was deemed to breach Article 6.

---

[6] *Murray v United Kingdom* (1996) 22 EHRR 29.
[7] *O'Halloran and Francis v UK.*
[8] *Jalloh v Germany.*

[9] See submission of Irish Government to the ECtHR in the case of *Paul Quinn v Ireland*, admissibility ruling, p. 7, 36887/97.

17. In *O'Halloran and Francis*, the ECtHR held that the right to silence and the privilege against self-incrimination are not absolute in the sense that there will be an automatic breach where an individual is subjected to a direct compulsion to make an incriminating statement. In that case, a legislative provision requiring car owners to disclose the name of the driver of the vehicle at a time when the vehicle had broken the speed limit was held not to breach the privilege against self-incrimination. The Court noted that the nature of the police enquiry was limited to the identity of the driver and confined to a situation where a motoring offence was suspected. There were also safeguards in the legislation to avoid imposing demands on the owner that were too onerous.

Whether the Judgment of the Supreme Court in *Heaney* should be Reconsidered

18. The Issue Paper filed for this appeal raises the question of whether the Judgment of this Honourable Court in *Heaney*[10] ought to be reconsidered. The Commission respectfully suggests that it should be. Questioning of the type provided for under S.52 OASA amounts to a breach of the essence of the privilege against self-incrimination and does not respect the dignity and personal autonomy of the person. It breaches Article 38.1 of the Constitution, irrespective of whether evidence gained from coercive questioning is ultimately adduced at trial.

19. Outside of the context of civil regulatory enforcement, what is the purpose of coercive questioning? Is a severe criminal sanction proportionate to the end to be achieved if, as this Court has held in *Re National Irish Bank Ltd*[11], the answers cannot be used as evidence in a criminal trial? While it could be suggested that the coerced answers might further the criminal investigation, rather than lead to a directly inculpatory admissions, it should be noted that the ECtHR in *Saunders v UK*[12] rejected an interpretation of the right to silence to the effect that only incriminating statements are protected, whilst answers that are indirectly probative or which establish relevant facts are acceptable.

20. It is submitted that it would also be objectionable to rely on evidence at trial that has been gathered as a result of matters established during coercive questioning of the suspect. The uncertainty surrounding the use to which coerced answers can be put is itself unsatisfactory, as a person who fears self-incrimination cannot properly assess the consequences of answering the questions posed. If the purpose of the questioning is merely to discount the person as a potential suspect, then the person being questioned has little to fear and would be likely to cooperate in any event.

21. It is submitted that constitutional protection from coercive questioning should not revolve around the issue of whether the affected person subsequently faces a criminal trial where

---

[10] [1996] 1 IR 580.
[11] [1999] 3 IR 145.
[12] (1996) 23 EHRR 313.

reliance is placed on the answers provided. Such questioning often arises in the context of a lengthy detention, in which the liberty of the person is restrained. The consequences for the affected person do not necessarily end with release from custody or when they are no longer of interest to the Gardaí. 'Soft' information in respect of arrest or questioning may emerge in the context of records checks, for the purposes of employment, particularly work involving children or vulnerable adults or national security or when seeking a visa for the purposes of travel[13]. The general ignominy of being arrested or questioned by the Gardai can impact on work, family and social life.

22. An obvious but important point is that section 9(1)(b) carries a wide power of arrest and, therefore, may affect a person's right to liberty and good name, even if charges are never brought. This point is relevant to the appellants' main argument in the substantive appeal, as well as to the separate issue of prematurity which is considered further below. Where a person is arrested on suspicion of committing the offence of withholding information, that fact may be recorded on the Garda PULSE system, or on other Garda databases for obtaining security clearance, over and above normal garda vetting procedures.

23. The comment of O'Flaherty J in *Heaney*, that innocent persons have nothing to fear from cooperation with the authorities, appears to be incorrect. Examples from the case-law set out below demonstrate that the impact on innocent persons is real. The risk is particularly acute where a person is being asked to provide information about the involvement of others, when divulging the information cannot be divorced from alluding to their own presence at the location of a crime. They may have a legitimate fear that giving honest answers about their association with other persons will result in a charge being preferred against them in circumstances where they have committed no offence or where the charge preferred would not reflect their own level of culpability.

Comparative examples of whether fear of self-incrimination amounts to a reasonable excuse for withholding information

24. In *Heaney*, when discussing examples of lawful abridgements of the right to silence (understood as a corollary of the right to freedom of expression), O'Flaherty J noted at p.585 that:

> *'...it is, of course, well established that so far as the administration of justice is concerned the exercise of the judicial power carries with it the entitlement of a judge to compel the attendance of witnesses 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": per Walsh J, delivering the judgment of the Court of Criminal Appeal in the case of In re O'Kelly (1974) 108 I.L.T.R. 97 at p. 101 (cf. Murphy v. Dublin Corporation [1972] I.R. 215). Of course,*

[13] If asked whether they have ever been arrested in relation to an offence of moral turpitude when seeking a visa waiver to fly to the US, they would not be eligible for the scheme if they answer positively.

at common law no witness is punishable for refusing to answer a question which he claims may incriminate him. As Dr. Glanville Williams has pointed out "the rule has not been doubted for four centuries".

25. While in this jurisdiction and the UK, a witness may refuse to answer questions due to a fear of self-incrimination, this rule is not observed universally. In both Canada[14] and Australia[15], there is a judicial power to summons and question witnesses for the purpose of investigating terrorist offences. Witnesses called under this process cannot refuse to answer questions on the grounds that the answer may incriminate them, although if they do answer, those answers cannot be used in evidence against them in a criminal trial. It seems likely that such provisions would not be compliant with Article 6 ECHR if replicated in a signatory State, given the risk of self-incrimination, the breadth of the possible questioning and the severe criminal sanction for failing to answer[16].

26. O'Flaherty J also commented at p.585 that *'the offence of misprision of a felony is committed if a person conceals or procures the concealment of a felony known to have been committed. It is the duty of all citizens to disclose to the proper authorities all material facts as to the commission of a felony of which the citizen has definite knowledge.'* In the UK, prior to its abolition, the misprision of a felony offence did not require a person to divulge information about the crimes of others, if such disclosure was liable to incriminate that person. In this regard, it is worth considering the facts of the case of *R v King*[17], as it demonstrates the unfairness that can arise, in the absence of appropriate safeguards, for a person who is being simultaneously questioned about their own criminal conduct as well as the conduct of others.

27. The Court of Criminal Appeal, per Lord Chief Justice Parker, said as follows:

'The point taken by Mr. Solley for the appellant is really this, that while there is a duty on a man who knows that a felony has been committed- and this man at any rate knew it when the police told him of it on the 13th July- yet that duty to make full disclosure of the felony must have some limitation. He refers to the classic case on the matter in the House of Lords, Sykes v. Director *of* Public Prosecutions, *reported in 1962 Appeal Cases, page 528 and in particular to the judgment of Lord Denning. At page 564 of the report, Lord Denning said this: "I am not dismayed by the suggestion that the offence of misprision is impossibly wide: for I think it is subject to just limitations. Non-disclosure may sometimes be justified or excused on the ground of privilege. For instance, if a lawyer is told by his client that he has committed a felony, it would be no misprision in the lawyer not to report it to the police, for he*

---

[14] Section 83.28 of the Canadian Criminal Code.

[15] Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003.

[16] In Australia, 5 years imprisonment under S.34G of the Act.

[17] *R v King* [1965] EWCA Crim J0209-1.

might in good faith claim that he was under a duty to keep it confidential. Likewise with doctor and patient, and clergyman and parishioner. There are other relationships which may give rise to a claim in good faith that it is in the public interest not to disclose it". At the end of the paragraph he says: "The judges have not been called upon further to define the just limitations to misprision, but I do not doubt their ability to do so, if called upon".

It is in those circumstances that Mr. Solley urges that there must be at any rate this further limitation beyond those instanced by Lord Denning, namely that non-disclosure is excused where disclosure would tend to incriminate the person concerned, and in that connection he refers to the cardinal principle of English law that a man is not bound to incriminate himself. Accordingly he says that at no stage after the appellant was told of the felony by the police was he under any duty to disclose such information in connection with it as was within his knowledge. He puts it in two ways; he says while at any time being questioned about the hiring of the car, any disclosure in connection with that would amount to a confession. He goes further and says that quite apart from that offence of which he was convicted, any further information would cause him to be involved with those who were in fact guilty of the robbery and that even if he was innocent it would invite, as it were, prosecution.

In the opinion of this Court there clearly is such a limitation on the duty to disclose and indeed it is to be observed that Mr. Crespi for the Prosecution made two concessions here; firstly, that at any rate after the caution, silence could not possibly constitute the offence of misprision, and secondly that a man when questioned about a serious offence is not bound to answer if his answer would tend to incriminate him, either of that offence or of another offence.'

28. The reasoning of Lord Chief Justice Parker in *R v King* was expressly applied by Hutton J in a Northern Ireland case in 1986, *Donnelly*[18]. The accused was charged with a withholding information offence very similar in wording to S.9(1)(b), but confined to terrorism offences. The accused had made admissions to police that he had found beer kegs containing explosives in an outhouse on his farm. After making enquiries with a person who he believed to be an IRA member, the accused was told that the explosives belonged to men 'on the run' and would be removed from the farm later that night. Once removed however, the explosives were used in a landmine attack which killed four soldiers, on patrol on the road near Omagh.

29. In dismissing the charge of withholding information under S.5 of the Criminal Law (Northern Ireland) Act 1967, Hutton J held that the accused had a reasonable excuse not to provide the information to the police in respect of the comments made by the IRA member (which could have linked that person to the murders) because the accused had a legitimate reason to fear that he would himself face criminal charges of he did. In fact, the accused

[18] [1986] 3 N.I.J.B. 48.

did face charges of possession of the explosives with intent to cause injury, but the charges were dismissed because they were not made out on the facts. Hutton J noted that the accused's fear of self-incrimination was neither fanciful nor artificial and he held that the defence of reasonable excuse was open to the accused for that reason. The facts of *Donnelly* support the notion that, contrary to the views expressed by O'Flaherty J, the fear of self-incrimination can be held by a person who genuinely fears that criminal charges will be brought against them which do not reflect their level of culpability or in circumstances where they have committed no offence.

30. In the Scottish case of *HM v Von*[19], a suspect arrested in respect of UVF-related activities was warned during a police detention that it was a criminal offence to withhold information in respect of terrorism offences (under legislation similar to the terms of S.9(1)(b), but confined to terrorist offences). The following day, and despite being given a caution in respect of the right to remain silent in respect of his own criminal conduct, the accused volunteered inculpatory information. He stated that he was reluctant to speak of the involvement of others. Lord Ross said as follows:

> *"Counsel for the accused objected to the admissibility of the statement which followed that warning on the ground that the accused in the circumstances had been forced to incriminate himself, being compelled after the provisions of the Act had been drawn to his attention, to make a statement against himself. He contended that the officers ought when they advised the accused of the terms of the section, to have drawn his attention to the fact that the offence was committed if there was failure without reasonable excuse to disclose the information, and he submitted that one could reasonably be excused from not disclosing information if the information would be self-incriminating...*
>
> *If on the Sunday the accused had been given the usual full caution or had been informed that he was not obliged to give information which would incriminate himself and he had then made a statement, I would have thought that that statement would have been admissible as being a statement which had been fairly obtained and was not a statement made in response to pressure or inducement or as a result of other unfair means. In the event, however, the statement on Sunday was made by the accused after he had been told on the previous day of his obligations under s. 11 and without his ever having been told that he need not incriminate himself. That being so, I am satisfied that the statement here is not admissible.*
>
> *So far as the evidence goes, the accused was left in total ignorance of the fact that he was not obliged to incriminate himself. Almost 150 years ago in the case of Livingstone v. Murray (1830) 9 Shaw 161, Lord Gillies said: 'It is a sacred and inviolable principle that no man is bound to incriminate himself'. I do not consider that a statement can be regarded as being fairly obtained if the accused was never advised of the fact that under our law no person is required to incriminate himself.*
>
> *In enacting the provisions of the Act of 1976, if Parliament had intended to make*

[19] HM Advocate v Von 1979 SLT.

statements of suspects admissible against them in the event of their being subsequently charged I would have expected Parliament to have made that clear. I cannot believe that Parliament intended to alter the well-established principle of our law that no man can be compelled to incriminate himself. If Parliament had intended so to do I would have expected it to be made clear.

No doubt statements may be taken from suspects under the Act, and such statements may assist the police in their inquiries; but they will not in my opinion be admissible against a suspect who is subsequently charged unless the suspect has been advised that he cannot be compelled to implicate himself. I would only add that in this case the evidence seems to show that the police authorities were very conscious of the problem which was created for them by the provisions of s.11 of the Act, and evidence has already been given from two senior police officers who appreciated the importance of the well-established rule against self-incrimination.

As I have indicated, if a full caution had been given or clear advice given to the suspect that he need not incriminate himself, the statement might well have been admissible: but the only warning here given was that what he said could be used in evidence, and I do not regard that as a sufficient warning to the accused that he was not obliged to incriminate himself. In these circumstances I shall sustain counsel's objection to the admissibility of the statement made on the Sunday by this accused at 12.50 p.m."

31. It might be noted that the comments of Lord Ross about the intentions of Parliament are echoed in those of Keane J in *DPP v Finnerty*[20], in the context of whether a Jury would be entitled to be told that an accused had exercised their right to silence during questioning, pursuant to a detention under S.4 of the 1984 Act. Keane J held that *'Had the Oireachtas intended to abridge the right to silence in this manner, it would have expressly so legislated'.*

32. In summary, it is submitted that applying the presumption of constitutionality to the section impugned in these proceedings, a genuine fear of self-incrimination can amount to a reasonable excuse for failing to provide material assistance to Gardaí. There is nothing in the section which ousts this interpretation and it is the only interpretation which accords with constitutional and Convention principles. As noted by Baker J in the High Court, compared to S.52 OASA, the withholding information offence under 9(1)(b) is wider in scope and is far more onerous in respect of the available penalty. Failing to recognise a risk of self-incrimination as a defence under the section would, of itself, mean that S.9(1)(b) fails to comply with the requirements of Article 6 of the Convention and of Article 38.1 of the Constitution.

33. Notwithstanding that the defence of reasonable excuse appears to be open to an affected person who fears self-incrimination, this will not at all be clear to the affected person at the time when they must consider whether to exercise that privilege. It is submitted that the section does not offer sufficient protection of the exercise of their right to silence, due to

[20] [1999] 4 IR 364.

its lack of clarity and the lack of safeguards to protect the affected person in their interactions with the Garda Síochána.

Section 9(1)(b) is unconstitutional by reasons of its vagueness and the lack of safeguards therein.

34. The Respondent was apparently cautioned on several occasions over a long period of time of his right to silence in respect of the substantive offence. He was not warned of the possibility that he was committing a criminal offence by withholding information about the involvement of others. The Appellants now emphasise that it was the Respondent's alleged failure to come forward with information over the whole period which matters for the purpose of the withholding information charge. In this regard, there is an implication that if there was an unfairness in the interactions between the Respondent and the Gardaí, this is a matter best left to the trial court to remedy.

35. The Respondent's case, leaving aside the issue of whether his 'no comment' interviews might be adduced against him at trial, demonstrate the significant unfairness that can arise under the section. The facts of *King, Von* and *Donnelly* support the conclusion that the Respondent's case is not an extreme, outlying exception to the otherwise-fair investigation of the offence. There are inherent problems with the section, some of which are reflected in the Respondent's own case. It is submitted that the consequences of the unfairness arising under the section are not best left to a trial judge, as they are liable to be repeated in other cases.

36. Ashworth has argued[21] that *'since the criminal law is intended to guide conduct, it should be as clear and certain as possible. This is particularly important in relation to offences of omission, which require a person to do a certain action in a given situation or to face punishment. Thus, offences of omission ought to comply with rule-of-law values, such as maximum certainty of definition, fair warning and fair labelling, so as to indicate clearly the action that a person is required to take.'*

37. To mitigate the rigorous application of the principle of *ignorantia juris haud excusat*, there must be a corresponding obligation on the Oireachtas to pass laws which are clear in their scope and in their effect. As noted by the Respondent in his submissions, both the Constitution and the Convention protect the requirement of legal certainty. In the particular context of provisions which impinge on the liberty of the person, as this provision does, the law must be foreseeable, accessible and predictable. The Commission adopts the analysis of the Respondent at paragraphs 65 and 66 of his submissions, referencing the 'Quality of law' test set out in the *Sunday Times v UK*[22] case as well as the comments of Hogan J in

[21] Andrew Ashworth, *'Positive Duties, Regulation and the Criminal Sanction'*, Law Quarterly Review 2017, p.7
[22] [1979-1980] 2 EHRR 245.

the case of *Douglas v DPP*[23], in respect of the requirement that a statute attains clarity in respect of what conduct is prohibited.

38. The Commission agrees with the finding of Baker J that at the actual point of engagement with the Gardaí, either as a suspect in respect of the substantive offence or when questioned informally as a potential witness, considerable unfairness attaches to the operation of the impugned section by reason of the lack of safeguards therein and the vagueness surrounding the scope of the obligation on the affected person to divulge information. The unfair situations that can arise when investigating the offence of withholding information could be prevented by a more tightly-drafted statute containing express and clear safeguards.

39. It is respectfully submitted that a person who the Gardaí suspect of having relevant information in respect of an offence should be warned of the suspicion and of the existence of the withholding information offence. Unlike S.91(1)(a), which remains in force and which requires persons to prevent offences actually occurring by providing relevant information to authorities in advance, there does not appear to be any compelling reason of principle or practice why a person suspected of withholding information about an offence already committed under S.9(1)(b) could not be afforded an opportunity to consider their position prior to bringing charges against them.

40. While everyone is taken to know the law and must regulate their behaviour accordingly, there are criminal offences[24] which involve a warning to the affected person which gives them an opportunity to rectify their conduct prior to facing a charge. S.52 OASA itself requires a warning to be given. It is submitted that the unusual nature of the withholding information charge and the breadth of its possible application, including against the family member of suspects, merits a similar statutory warning.

41. Reflecting on the manner of questioning of the accused persons in the UK cases of *King* and *Von*, as well as on the facts of the Respondent's own case, it should be stated that under Irish law, the focus of questioning during a detention should be on the alleged crime of the suspect. While questions about the involvement of others will of course be relevant to link the suspect to the crime and to understand the overall picture, particular care is required to ensure that the threat of a withholding information charge does not become a coercive means of gathering inculpatory evidence against the accused. It is also questionable whether it is procedurally permissible to invoke the offence of withholding information during a detention (as happened in *Von*). That would not appear to accord with the proper purpose of a detention.

42. If a suspect is actually arrested for the offence of withholding information, then the purpose of questioning in that context would be to establish whether the crime has been committed. To vindicate the privilege against self-incrimination, it would be essential that the suspect

---

[23] [2014] 1 IR 510.

[24] Such as under S.8 of the Public Order Act 1994.

would be able to invoke their right to silence during such a detention on the issue of whether they have withheld information, without a risk that their silence would later be used as further evidence that they are withholding information. It can be seen that there are both practical difficulties and issues of fairness surrounding the manner in which the withholding information offence can be investigated. It is respectfully submitted, therefore, that it ought to be a mandatory requirement that in suspected instances of culpable failure to provide information, questioning should be formalised and should be preceded by a clear statutory warning. Once a Garda suspects that the affected person may have information about the involvement of other persons in the crime under investigation, it would be appropriate that the person be warned 1) that the Garda so suspects 2) that it is an offence, subject to a defence of reasonable excuse, not to provide material assistance if the person possesses relevant information 3) that if the affected person fears incriminating themselves, this may amount to a reasonable excuse for not providing information about the offence.

43. While not all possible excuses could be encompassed in such a warning, the warning should include reference to the privilege against self-incrimination. It is also respectfully submitted that the potentially unfair application of the withholding information offence could be further addressed by expressly confining the offence to those instances where the failure to provide information is wilful, knowing or dishonest[25] in nature.

44. An affected person should be given an opportunity to consult with a solicitor prior to answering questions. As with questioning in respect of adverse inferences pursuant to the Criminal Justice 1984 Act as amended, the circumstances of the offence under investigation should be properly explained to the solicitor, so that the advice given in respect of the defence of reasonable excuse can be properly contextualised.

45. While a general withholding information offence does exist in Northern Ireland under S.5 of the Criminal Law (Northern Ireland) Act 1967, in the rest of the UK there is no obligation to provide such information except in respect of terrorism offences under s.38B of the Terrorism Act 2000. In other jurisdictions, withholding information offences are 'far from commonplace', according to Walker[26]. Where they are present, the focus is usually on terrorist offences and in particular, on the prevention of such crimes. In the UK, the offence appears to have been used by the police predominantly as a threat against associates and family members during the investigation phase. Where prosecutions have been brought, they have usually related to a failure to warn of a pending terrorist attack[27].

46. The Respondent has raised an issue about the history of enforcement of the impugned section. Since the admissibility of the statistics relied on is objected to by the Appellants, the Commission does not intend to comment on this issue. However, the breadth of the application of the section and its potential use in respect of family members of suspects is

---

[25] See Ashworth article, at p.12.
[26] Clive Walker, *'Conscripting the public in terrorism Policing: towards safer communities or a police state?'* Criminal Law Review 2010, p. 7.
[27] Walker article, p.3.

of concern to the Commission. There is a lack of clarity in respect of whether close familial ties would be a basis for a person to fail to disclose relevant information to the Gardaí about a family member. In the equivalent UK provision on terrorism offences, familial relationships do not appear to offer an automatic defence of reasonable excuse[28]. Under the French criminal code however, family members do not bear the same onus to report the activities of family members[29]. The requirement to provide information about close family members under the impugned section is unclear. A person faced with the choice of whether to divulge information has no guidance from the statute as to whether the defence of reasonable excuse is open to them in such circumstances.

47. As Lord Denning noted in the *Sykes*[30] case, other privileges can also arise in the context of a withholding information offence such as legal professional privilege, journalistic privilege and that between doctor-patient and clergy-parishioner. Michael McDowell S.C., in a paper[31] in respect of the codification of Irish criminal law, suggested that it would be appropriate that the vaguely-defined 'reasonable excuse' defence should be properly codified and in greater detail than the 'poor attempt' made by Lord Denning in *Sykes*. McDowell noted the arbitrary distinctions drawn in that case, for example, that an employer might be forgiven for failing to report an employee for theft, but a family member apparently would not benefit from the same latitude in a serious case.

48. These considerations are of growing relevance, given that there is an increasing trend to place obligations on persons to report potential criminal conduct. In some of these contexts, the privilege against self-incrimination is less likely to arise as a possible defence, but the wilfulness of the failure to come forward might be a relevant consideration in respect of culpability. Mandatory reporting provisions are contained in S.2 & 3 of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012; S.19 of the Criminal Justice Act 2011 in respect of white collar crime; and S.42 Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. Such provisions appear rarely, if ever, to be used to ground a criminal charge and instead have served as a means to ensure compliance with reporting obligations.

---

[28] Walker article, p.3.
[29] Article 434-1. 234-2 of the French Criminal Code.
[30] Sykes, [1962] A.C. 528 at 563.

[31] Michael McDowell S.C. *'Some elements of a modern codified criminal law of preparation and facilitation of serious criminal offences'* International Conference on the Codification of Criminal Law, Dublin Castle, 13 July 2008.

The Appellants' argument on Prematurity

49. It should be noted that the Issue Paper in this case which was formulated following the management hearing herein makes no mention of the Appellants' argument on prematurity. Nonetheless, for completeness, it might be helpful to address briefly the Appellants' arguments under this heading.

50. The Appellants rely on the jurisprudence that indicates that where the issues between parties can be determined and finally disposed of by the resolution of an issue of law other than constitutional law, the Court should proceed to consider that issue first and, if it determines the case, should refrain from addressing the constitutional question. The Appellants contend that this rule of judicial restraint (which stems from the presumption of constitutionality) means that a constitutional challenge should not be entertained where there is a possibility that the Respondent will be acquitted at trial or otherwise may benefit from legal rulings made by the Trial Judge, which may cure the complaints giving rise to the constitutional challenge.

51. In that regard, the Appellants rely on the decision of Humphreys J in *Bita -v- Ireland & Others*[32] where the Learned Judge emphasises the need to exhaust local remedies before bringing a constitutional challenge. The *rationale* offered is that a Court should not embark upon an enquiry into the constitutionality of a duly enacted statute before it is determined that an accused is clearly damnified to the extent of being convicted under the statutory provision in question. The suggested rationale for this is that, if the accused is not convicted or, having being convicted, is acquitted on appeal, the issue of constitutionality simply does not arise. According to this argument, if the accused is convicted, he can at that stage apply for *certiorari* of the conviction.

52. It is respectfully submitted that this analysis is unduly strict and fails to cater for the situation where the existence of the criminal offence itself is being challenged. Moreover, the analysis of Humphreys J in *Bita* is not easily reconcilable with this Court's jurisprudence on the question of prematurity, as set out by Geoghegan J in *Osmanovic -v- Ireland & Others*[33]. According to that case, the High Court should proceed to hear a constitutional challenge where a plaintiff has a reasonable apprehension that a determination affecting his rights will be made.

53. In *Curtis –v- Attorney General*[34], the plaintiff faced charges that he had fraudulently evaded customs duty which were levied on certain goods. S.34 of the Finance Act, 1963 provided for a procedure whereby the Revenue Commissioners could estimate the value of the goods in question. In the event that this aspect was challenged, the value of the goods was to be determined conclusively by the District Court and there was to be no appeal against that decision. In the event that the value of the goods exceeded £500, the legislation provided that the case was to be tried on indictment, but for some reason the value as determined by the District Court was to bind the jury. Carroll J in the High Court held that the plaintiff had the necessary *locus standi* to challenge the constitutionality of the legislation. She stated as follows:

---

[32] *Bita -v- Ireland & Others* (2016) IEHC 288.
[33] *Osmanovic -v- Ireland & Others* (2006) 3 IR 50.
[34] *Curtis –v- Attorney General* (1985) IR 458.

"*While the determination by the District Court in accordance with s. 34, sub-s. 4 might be in his favour, he is nevertheless in imminent danger of a determination affecting his rights. It is not necessary that a determination adversely affecting rights must first be made before a constitutional challenge can be started. It is sufficient if there is a reasonable apprehension of such determination: see Cahill –v- Sutton* [1980] I.R. 269, at page 286"

(emphasis added)

54. This decision of Carroll J was expressly approved of by this Court. In *Osmanovic –v- Ireland & Others*[35] the applicant sought to challenge the constitutionality of fixed penalty provisions in respect of the illegal importation of goods. In the High Court, O'Caoimh J dismissed the challenge as being premature. The Supreme Court expressly overturned this decision, deeming the action to be not premature. Geoghegan J gave the judgment of the Court dealing with the prematurity issue and he stated *inter alia* as follows:

> *"Is each of these appellants acting prematurely in seeking to challenge the constitutionality of section 89(b)? The learned trial judge thought so but I do not agree.*
>
> *In the case of the Osmanovics, the judge took the view that these applicants might well be acquitted on the merits and that they should wait until they were convicted before mounting any challenge to the constitutionality of the provision. In relation to the [companion] Sweeney case the respondents lay emphasis on the very early stage of that case and that it is not known yet what options are open to that appellant at the District Court stage. In other words, the Criminal Procedure Act, 1967 has not really yet come into play. The trial judge seems to have been of the same view. I do not accept that locus standi is such a narrow concept or that the views of the learned trial judge conformed with the principles of this court set out in Cahill v. Sutton [1980] IR 269. I appreciate that prematurity and locus standi are not quite the same thing. In each of these three cases, however, I am of the opinion that if the appellants' complaints based on the Constitution could be arguably justified, they are perfectly entitled to air them at this stage. In each case, prosecutions have at least been instituted.*
>
> *..... In expressing the views which I have done, I would prefer to rely on general principle supported by the case which seems to me to be most relevant that of Curtis v. Attorney General, a decision of Carroll J in the High Court.....In that case, there was a prosecution under section 186 of the Customs Consolidation Act, 1876 as amended and*

[35] *Osmanovic –v- Ireland & Others* (2006) 3 IR 50.

by reason of the provision for the determination of value of the goods the plaintiff wanted to challenge the constitutionality of the relevant provision ahead of the trial. Carroll J took the view that the plaintiff had locus standi to challenge the constitutionality of the provisions in question "as he was in imminent danger of a determination affecting his rights, and this need not necessarily be a decision which would adversely affect his rights." In my opinion, Carroll J applied the law correctly.

Applying the same principles to this case, I consider that none of the proceedings, the subject matter of this appeal, are premature."

(emphasis added)

55. Similarly, in *SM –v- Ireland (No. 2)*[36] the plaintiff had been returned for trial in respect of indecent assault offences allegedly committed under s.62 of the Offences Against the Person Act, 1861. That section provided for radically different penalties which were dependent on whether the victim was male or female. Applying the Supreme Court's decision in *Osmanovic,* Laffoy J in the High Court held that the plaintiff had the requisite standing to challenge the constitutionality of the sentencing provisions, even though he had merely been *charged* with an offence under that section.

56. In *O'Mahony –v- Melia*[37] Keane J spoke of the *locus standi* test being whether the plaintiffs were "broken, endangered or threatened" if the legislation which purported to authorise their overnight detention was invalid. Similarly, in *O Clearigh –v- Minister for Agriculture*[38] Lynch J held that the plaintiff had *locus standi* to challenge the validity of an as yet uncommenced item of legislation which, if duly commenced, would abolish the offence on which he was currently held and that he therefore had a "real and present interest" in the matter.

57. More recently, Hogan J considered the prematurity issue in *BG –v- District Judge Catherine Murphy & Others*[39] in which he followed this Court's decision in *Osmanovic* and rejected the State's submission in that particular case that the challenge to a particular provision of the Criminal Law Insanity Act was premature and speculative. Having referred to the exceptional factors that arose in McMenamin J's judgment in *Kennedy –v- DPP*[40]. Hogan J went on to consider the whole objective behind the mootness and prematurity doctrines. He observed that it was clear from *Curtis*, *Osmanovic* and *SM (No.2)* that an applicant accused of a criminal charge has the necessary standing to challenge the constitutionality of elements of the sentencing regime, even though, of course, the accused might never have been convicted of any offence. Hogan J remarked that one common feature of these three decisions would seem to be that any accused is entitled to know with

---

[36] *SM –v- Ireland (No. 2)* (2007) 4 IR 369

[37] *O'Mahony –v- Melia* [1989] IR 335

[38] *O Clearigh –v- Minister for Agriculture* [1998] 4 IR 15

[39] *BG –v- District Judge Catherine Murphy & Others* (2011) IEHC 445, Unreported, High Court (Hogan J) 8th December 2011.

[40] *Kennedy –v- DPP* (2007) IEHC 3

certainty the penalty provisions of the offence with which he or she is charged and, accordingly, enjoys the requisite standing to challenge these provisions. These remarks have an echo in the present case in circumstances where one of the Respondent's complaints in these proceedings is that the offence is unclear and vague and that it is difficult for the Respondent's legal advisors to properly advise him.

58. More generally, the question of whether proceedings challenging the constitutionality of legislation should be postponed until after a criminal trial has taken place, will fall to be considered on a case by case basis and will depend on the individual circumstances of each given case. Amongst the considerations that may have a bearing on this question will be the following factors:

    (a) The nature of the constitutional challenge and whether it calls into question the existence and validity of the criminal charge itself;
    (b) Whether the outcome of the challenge would materially impact the ability of the applicant's legal advisors to provide legal advice;
    (c) Whether the charge involves the possibility of imprisonment;
    (d) The question whether the proceedings raise a separate non-constitutional issue and, if applicable, the ease with which the other legal issue might be carved away for preliminary hearing;
    (e) The extent to which the constitutional challenge engages issues of fairness and constitutional justice;
    (f) The question whether the impugned section is used frequently or whether the mischief complained of is likely to reoccur;
    (g) The possibility the constitutional issue may ultimately escape review, particularly if the window of time for challenging the measure will usually be narrow; and.
    (h) The possibility that there may not be an opportunity to challenge the legislation at a later stage e.g. if an applicant is arrested on suspicion of committing the impugned offence, but is ultimately never charged.

59. In the light of the above factors, and particularly having regard to this Court's decision in *Osmanovic*, it is submitted that in the present case Baker J was correct to reject the Appellants' prematurity arguments. Moreover, since the High Court has opined on the matter and found the section to be unconstitutional, it is submitted it would be in the public interest for this Court to address the substantive merits of the Respondent's challenge.

Mícheál P. O'Higgins SC

Mark Lynam BL

Word Count: 8673