THE COURT OF APPEAL
CIVIL

Record No. 2022/182
2022/184

Between:-

STEPHEN TALLON

Applicant/Respondent

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

Respondents/Appellants

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

SUBMISSIONS OF THE *AMICUS CURIAE*

A. INTRODUCTION

1. This is an appeal from a judgment of the High Court (Phelan J), in which the Court quashed a Civil Order made against the Respondent by the District Court under section 115 of the Criminal Justice Act 2006, and two convictions under section 117 of the Criminal Justice Act 2006 for breach of the Civil Order.

2. The Irish Human Rights and Equality Commission ('IHREC') was granted liberty to appear as amicus curiae on 13 January 2023 and will seek to assist the Court by addressing the key human rights issues arising in the case, namely:

    a. The availability of judicial review;

    b. The requirement for legal certainty in the terms of Civil Orders made under Part 11 of the Criminal Justice Act 2006; and

c. The statutory and constitutional requirement for proportionality in the framing of such Orders.

3. In IHREC's respectful submission, the Civil Order made in the District Court against the Respondent pursuant to section 115 of the Criminal Justice Act 2006 was impermissibly vague and disproportionate. IHREC will argue that the judgment of the High Court should be affirmed and these appeals dismissed.

B. QUESTIONS PRESENTED

4. It is central to the function of any *amicus curiae* that it assists the Court in resolving the case before it: *Dowdall and Hutch v. DPP* [2022] IESC 36, *per* O'Donnell CJ, 29 July 2022, paragraph 48.

5. Having considered the Appellants' Notices of Appeal and the submissions of the parties, it appears to IHREC that it will be in a position to assist the Court in determining three of the important human rights issues in the appeal:

a. Alternative remedies

Whether it was open to the Respondent to challenge the Civil Order by way of judicial review;

b. Certainty

Whether the Civil Order made by the District Court in respect of the Respondent on 31 August 2020 was sufficiently precise to ensure respect for the Respondent's right to trial in due course of law under Article 38.1 of the Constitution; and

c. Proportionality

Whether the Civil Order involved a disproportionate interference in his right to freedom of expression guaranteed by Articles 40.3 and 40.6.1 of the Constitution and was therefore *ultra vires* section 115(1) of the 2006 Act.

6. To the extent that the Appellants' appeal against the rejection by the High Court of the other preliminary and procedural objections they raised against the Respondent, IHREC takes no position on these issues on the grounds that they do not raise questions of human rights and equality law.

7. IHREC proposes to draw the attention of the Court to law and practice here and in the United Kingdom which it believes will assist the Court in determining these issues.

C. ALTERNATIVE REMEDIES

8. The importance of judicial review as a mechanism of human rights protection under the Constitution has been emphasised by the Courts: see for example *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 and *Efe v. Minister for Justice, Equality and Law Reform* [2011] 2 IR 798) and *Mallak v. Minister for Justice, Equality and Law Reform* [2012] 3 IR 297. For that reason, there can be no categorical rule requiring exhaustion of other potential remedies before judicial review can be granted. An appeal on the merits is, after all, something quite different from a determination by the High Court of the legality of the whole matter.

9. IHREC notes that the question of whether there has been a failure to exhaust alternative remedies is one that goes to the exercise of the Court's discretion to grant relief by way of judicial review. The judgment of O'Higgins CJ in *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] IR 381 indicates that the question of whether an applicant for review should be required to exhaust alternative remedies is one for the discretion of the Court having regard to the adequacy of the alleged alternative remedy, the conduct of the applicant and the nature of the error alleged.

10. In this case, IHREC notes that the Respondent's application for judicial review included a plea that sections 115 and 117 of the 2006 Act were unconstitutional. That was a plea he was entitled to make, in the alternative, to his allegation, in effect, that the Civil Order was *ultra vires* and from his perspective, there were sound practical and strategic reasons for proceeding by way of judicial review immediately. Plainly, it would not have been open to him to challenge the constitutionality of the legislation in an appeal to the Circuit Court or in an appeal by way of case stated.

11. Fundamentally, the thrust of the Respondent's argument with regard to the making of the Civil Order was not simply that it was incorrect but that, by reference to the statute itself and the constitutional rights at issue, it was unlawful. Such an infirmity can be remedied by way of judicial review even where an appeal is available — see *Sweeney v. Fahy* [2014] IESC 50, per Clarke J (as he then was), 21 July 2014, paragraphs 3.4-3.6 and *Mooney v. DPP* [2019] IEHC 625, Simons J, 23 August 2019 paragraphs 16-33 — the rationale being that a person is entitled to a first-instance decision in accordance with law.

12. In IHREC's view, the State's argument that any lack of clarity or proportionality in the civil order could have been dealt with by way of an application to vary the terms of the Order under section 115(7) would have more force were it not for the fact that the Respondent was arrested and charged with non-compliance with the Civil Order almost immediately after it was made, and so never had any meaningful opportunity to consider its parameters or to seek clarification. To the extent that he sought clarification after the making of the Order, none was provided.

13. Because the terms of the Civil Order were integral to the Respondent's prosecution and conviction, the quashing of the Civil Order by way of judicial review would seem necessarily to entail the quashing of the convictions for non-compliance with that Order, and the authorities cited by the First Named Appellant do not appear to suggest otherwise.

14. For these reasons, IHREC's respectful submission is that the arguments by the Appellants with regard to exhaustion of alternative remedies were properly rejected by the learned trial judge.

D. LEGAL CERTAINTY

The terms of the Civil Order

15. The terms of the Order made by the District Court on 31 August 2020 were:

> *"HEREBY ORDERS pursuant to section 115 of the said Act of 2006 that the respondent be prohibited from engaging in public speaking and recording anywhere within the environs of Wexford Town including North Main Street Bullring, Selksker Square at any time."*

16. For present purposes, the Order contains three elements of relevance: the act of public speaking; the act of recording; and the geographical location - the environs of Wexford Town.

Failure to comply with the Civil Order is an offence

17. Under section 117, failure to comply with a Civil Order without lawful excuse is an offence. The elements of that offence are incorporated by the Order itself. It creates, in effect, an individualised criminal provision applicable only to its subject. In this regard, the learned High Court judge observed, at paragraph 106:

> *It is clear from the facts of this case that the effect of the making of the Civil Order is to make behaviour unlawful when carried on by the Applicant which would be perfectly lawful if done by any other citizen e.g. speak publicly or sing in a public place.*

18. A similar point was made by the Court of Appeal of England and Wales in *R v. Hancox* [2010] 1 WLR 1434, which concerned Serious Crime Prevention Orders made against two convicted forgers under the Serious Crime Act 2007. Among other things, the Orders prohibited the defendants from buying, owning or possessing a printer, photocopier, scanner, or foiling materials, and required that they notify the Serious Organised Crime Agency of any storage property they rented and of any vehicle to which they had regular access or control. The Orders were challenged on the grounds that they amounted to the imposition of a criminal penalty and that they were disproportionate. The Court of Appeal found that because the purpose of the orders was preventive, the process by which they were imposed was civil rather than criminal, but at paragraph 11, Hughes LJ made the following important observation:

> *Preventive orders of this kind in effect create for the defendant upon whom they are imposed a new criminal offence punishable with imprisonment for up to five years. They must be expressed in terms from which he, and any policeman contemplating arrest or other means of enforcement, can readily know what he may and may not do.*

19. Because they create offences, the rules relating to certainty and specificity in criminal law are relevant when considering these orders so as to protect the right to trial in due course of law under Art 38.1.

Criminal law must be certain and specific

Irish case law

20. IHREC respectfully agrees with the High Court that inherent in the concept of due process of law is that citizens shall be held equal before the law. The making of a Civil Order subjects the person to whom it relates to a criminal regime which applies only to them, and such differential treatment must be intrinsically proportionate and reasonable: see *MD v. Ireland* [2012] 1 IR 679 and *Murphy v. Ireland* [2014] 1 IR 198. IHREC submits that the High Court was correct when it observed (at paragraph 109):

> *Where a Civil Order is sufficiently closely tailored to the evidence given as to the behaviour which was condemned by the Court as constituting anti-social behaviour and drawn in a manner which captures that behaviour, then a recurrence of this same behaviour might justifiably result in the criminalisation of a defendant having regard to principles of legal certainty.*

21. In this regard, it is significant that requirements of necessity, reasonableness and proportionality are incorporated into section 115(1).

22. On the question of specificity, IHREC refers to the judgment of this Court in *Bita v. DPP* [2020] 3 IR 742, which concerned challenge on vagueness grounds to section 5 of the Summary Jurisdiction (Ireland) Amendment Act 1871 prohibiting indecent exposure and acts contrary to public decency in Dublin. The judgment contains review of case law, including *King v. Attorney General* [1981] IR 233, which was relied upon by the High Court as well as *The People v. Cagney* [2008] 2 IR 111, *Douglas v. DPP* [2014] 1 IR 510 and *Douglas v. DPP (No 2)* [2017] IEHC 248, McDermott J, 7 April 2017. What emerges from this review, in terms of principle, is that a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful, but that mathematical certainty is not required in the framing of an offence. This point is important having regard to the fact that Civil Orders are drafted not, as legislation is, by trained and experienced drafters in the Office of the Parliamentary Counsel, but by busy Gardaí and District Courts.

23. There is no case law in Ireland considering whether terms of Civil Orders are sufficiently specific, though in *Sentencing Law and Practice* (3rd edn) (Round Hall Dublin 2016), Prof O'Malley observes, at p 659 in relation to conditions attaching to suspension of sentences, that:

> *Conditions should conform, first and foremost, with the principle of legality: they should be clearly expressed and indicate precisely what the offender is required to do or refrain from doing. A requirement, for example, that the offender must stay away from the centre of Dublin for year would scarcely comply with this standard.*

24. This observation was cited with approval by the High Court in *Purdue v. DPP* [2016] 619, Barrett J, 8 November 2016 at paragraph 6. In *Mooney v. DPP*, cited above, Simons J made a similar observation considering the jurisdiction to impose restrictions on communicating with and approaching an injured party under subsections 10(3) to (5) of the Non-Fatal Offences against the Person Act 1997 (at paragraph 35):

> *First, it is a criminal offence to fail to comply with an order. It follows as a consequence that an order must be drafted in clear and precise terms. The person subject to the order is entitled to know what exactly it is that he or she is being prohibited from doing.*

25. This observation, in IHREC's submission, is applicable, *mutatis mutandis*, in the present context. Also relevant is the High Court's consideration of the form of the order made in *Mooney*, which was (at paragraph 38):

> *...[N]ot to communicate by any means with [the injured party] and not to approach within 2 kilometers (sic) of her place of residence or 500 meters (sic) of her place of employment if different and not to reside within 8 kilometers (sic) of the injured party for life….*

26. One of the deficiencies the High Court identified in this order was vagueness, with Simons J holding (at paragraph 47):

> *[T]he terms of the order are too vague. Given that non-compliance with the order constitutes a criminal offence, the order must identify the addresses which he is prohibited from approaching. It is not enough to refer baldly to the "place of residence" or the "place of employment" of the injured party.*

Case law from the UK on specificity in preventive orders

27. With regard to how such considerations might be applied in practice in the present context, case law from the UK authorities relating to Anti-Social Behaviour Orders made under section 1 of the Crime and Disorder Act 1998 and other similar orders may be of assistance. Section 1 of the English 1998 Act was framed in similar terms to section 115 of the Irish 2006 Act. English law also provides for a variety of preventive orders which, though they are civil in nature, have criminal consequences if they are breached, including Serious Crime Prevention Orders, Criminal Behaviour Order and Knife Crime Prevention Orders, and the courts in England and Wales have applied and developed the principles identified in ASBO cases in cases involved these other preventive orders. Anti-Social Behaviour Orders were abolished in England in 2015 by the Anti-Social Behaviour Crime and Policing Act 2014, which replaced them with Anti-Social Behaviour Injunctions. These injunctions are enforced not by criminal sanction but by the ordinary rules relating to contempt of court. Even so, many of the principles identified in case law under the 1998 Act have been found still to be relevant. Anti-Social Behaviour Orders are still available in Northern Ireland, as are Violent Offence Prevention Orders, so Northern Irish case law can also be instructive.

28. In *R v. P* [2004] EWCA Crim 287, the Court of Appeal of England and Wales considered an ASBO made against 15-year-old offender that contained limitations on the defendant's movements in the vicinity of two parks and at the local airport. The Court (*per* Henriques J) laid down the following principles in relation to the making of ASBOs (at paragraph 34):

> *(1) The test for making an order is one of necessity to protect the public from further anti-social acts by the offender.*
> *(2) The terms of the order must be precise and capable of being understood by offender.*

(3) The findings of fact giving rise to the making of the order must be recorded.
(4) The order must be explained to the offender.
(5) The exact terms of the order must be pronounced in open court and the written order must accurately reflect the order as pronounced.

29. The case of *R v. Boness* [2005] EWCA Crim 2395 concerned a challenge to an ASBO made against a young man convicted of burglary. Delivering the judgment of the Court of Appeal of England and Wales, Hooper J held (at paragraph 20):

> *Because an ASBO must obviously be precise and capable of being understood by the offender, a court should ask itself before making an order: "Are the terms of this order clear so that the offender will know precisely what it is that he is prohibited from doing?"*

30. The ASBO in question contained 14 terms, and the clarity and proportionality of each was considered. One of the terms was framed thus:

> *It is ordered that the defendant, Dean Boness is prohibited from:*
> *In England and Wales:*
> *…*
> *Having any item with you in public which could be used in the commission of a burglary, or theft of or from vehicles except that you may carry one door key for your house and one motor vehicle or bicycle lock key. A motor vehicle key can only be carried if you are able to inform a checking officer of the registration number of the vehicle and that it can be ascertained that the vehicle is insured for you to drive it.*

31. The State conceded, and the Court agreed, that this term was drafted too widely and lacked clarity on the basis that there are many items that might be used in the commission of a burglary, such as a credit card, a mobile phone or a pair of gloves. It was not clear whether Mr Boness was being prohibited from carrying such items.

32. Another term of the ASBO prohibited Mr Boness from '*[d]oing anything which may cause damage.'* The Court of Appeal found that this prohibition, even if justified was

far too wide. The State conceded the point, asking 'Is the Appellant prohibited from scuffing his shoes?'

33. The question of the geographical scope of an ASBO arose in *Allan v. Croydon London Borough Council* [2013] EWHC 1924 (Admin). The High Court of England and Wales held (at paragraph 25):

> *The terms of any order must be precise and capable of being understood by the offender. Thus, for example, an exclusion zone should be clearly delineated by a map which should clearly identify those with whom the offender should not associate.*

34. A similar point was made in *R v. Khan* [2018] EWCA Crim 1472, which concerned a challenge to a Criminal Behaviour Order made under section 22 of the Anti-Social Behaviour Crime and Policing Act 2014 against the driver of car whose passenger convicted of affray after an incident of road rage. The Court of Appeal of England and Wales (*per* Bean LJ) held (at paragraph 15):

> *Because an order must be precise and capable of being understood by the offender, a court should ask itself before making an order "are the terms of this order clear so that the offender will know precisely what it is that he is prohibited from doing?" Prohibitions should be reasonable and proportionate; realistic and practical; and be in terms which make it easy to determine and prosecute a breach. Exclusion zones should be clearly delineated (generally with the use of clearly marked maps, although we do not consider that there is a problem of definition in an order extending to Greater Manchester[1]) and individuals whom the defendant is prohibited from contacting or associating with should be clearly identified. In the case of a foreign national, consideration should be given for the need for the order to be translated.*
>
> [emphasis added]

35. The judgment of the Court of Appeal of England and Wales in *R v. Cornish* [2016] EWCA Crim 1450 is of relevance in the context of the terms of the order made by the

[1] Greater Manchester is an English county.

District Court in Wexford. It concerned an appeal of a restraining order made under section 5 of the Protection from Harassment Act 1997. The order was issued following the Appellant's conviction of affray and prohibited the Appellant from entering 'St Germans village or surrounding areas', for a period of five years. Under section 5(5)-(6) of the Protection from Harassment Act 1997, breach of such an order without reasonable excuse was an offence. The Appellant challenged the order on the grounds, inter alia, that it was impermissibly vague. In relation to the language of the order, the Court held (at paragraph 19):

> *Since this was an order whose breach had potentially serious penal consequences, it was essential that it should be precise; it was not. The term "St Germans village" itself lacked definition. The additional phrase "or surrounding areas" was vaguer still. If the appellant was to be prohibited from entering a particular area, it should clearly have been delineated. This could most easily be done by a boundary drawn on a map, although we do not preclude the possibility of other methods as long as these sufficiently clearly spell out what the defendant could not do.*

36. Finally, IHREC refers to the judgment of the Court of Appeal in Northern Ireland in *R v. Hanrahan* [2019] NICA 75, which involved a challenge to Violent Offences Prevention Orders made under Part 8 of the Justice (NI) Act 2015. The Court found that the Crown Court in Newry had erred in imposing 'intrusive and unnecessary' Orders, observing (at paragraph 50):

> *Fundamentally the subject must understand clearly how the relevant restrictions and intrusions are designed to operate from day to day. This means that particular care must be invested in the language in which the terms are formulated. Simple, clear and succinct terms are essential.*

37. In IHREC's submission, *'simple, clear and succinct terms'* are as essential in the framing of Civil Orders under the 2006 Act as they were held to be in the formulation of Violent Offence Prevention Orders in Northern Irish law.

38. Many of the English cases refer to statutory guidance issued by the Home Office in relation to applications for preventive orders. IHREC notes with concern that no

equivalent exists in Ireland to the statutory guidance issued in England and Wales in relation to the framing of Anti-Social Behaviour Injunctions and other similar preventive orders. Insofar as any guidance exists here, it is only by way of the example given of a Notice of Application for a Civil Order Form 96C.1 in the District Court Rules, which suggests that the applicant should 'set out the things to be specified in the order intended to be applied for which the respondent will be prohibited from doing, e.g. "that the respondent be prohibited from entering, or being in or about High Street between the hours of 8.00 p.m. and 8.00 a.m."' The difficulty created by the absence of general guidance is exacerbated by the fact that the single example given in Form 96C.1 is itself, in IHREC's view, lacking in specificity.

The Civil Order is impermissibly vague

39. Bearing this in mind, when the terms of the Order are considered *in abstracto* — as they should be, given that they create an individualised criminal offence — IHREC makes the following observations:

a. Although the concept of 'public speaking' may not in itself be problematically unclear in context, clarity should have been provided as to whether the public speaking to be prohibited was that engaged in in a public place or whether the prohibition also embraced addressing other people from a private place (such as the Respondent's home) via online live transmission (over Facebook Live, Instagram Live, TikTok Live, YouTube Live or Twitter, for instance). The State, in its Notice of Appeal (at 8.3), suggests that the Order did not extend to such communication, but that is not apparent from its terms, which it should have been.

b. If it was intended that the 'public speaking' to be prohibited was to include singing, that should have been specified.

c. It is not clear from the Order whether 'recording' refers to recording generally or just to recording of public speaking, nor is it clear whether the phrase 'public speaking and recording' is conjunctive or disjunctive.

d. The phrase ‘environs of Wexford Town’ is impermissibly vague. If an exclusion zone was to be imposed, this should have been done by reference to a map so that the scope of the Order would be clear.

40. The First Appellant argues that the High Court erred in law in holding that section 115 of the Criminal Justice Act 2006 was a penal provision and was required to be construed strictly by reason of this. The DPP argues that section 115 does not create a criminal offence nor does it give rise to criminal liability, and that section 117 is the criminal offence. But it was the Order that the High Court said should be strictly construed, not section 115. According to the Supreme Court in *The People (DPP) v. TN* [2020] IESC 26, *per* McKechnie J, 28 May 2020, the principle of strict construction of penal statutes means that where ambiguity should remain following the utilisation of the other approaches and principles of interpretation at the Court's disposal, the accused will then be entitled to the benefit of that ambiguity, and that the task for the Court is the ascertainment of the intention of the legislature through, in the first instance, the application of the literal approach to statutory interpretation. Here, the Court was not called upon to interpret the provision at all, but to assess whether it was impermissibly vague, which is a different exercise. As well as considering the Order’s terms in the abstract, the High Court was entitled to consider the particular underlying facts, and the circumstances of the prosecution and conviction, in assessing whether or not the Order was sufficiently clear.

41. For the reasons above, IHREC respectfully agrees with the High Court that the Civil Order made against the Respondent on 31 August 2020 lacks the necessary specificity to ensure that his right to trial in due course of law is protected.

E. PROPORTIONALITY

Proportionality in the statutory scheme

42. Section 115(1) provides:

> *115.— (1) On application made in accordance with this section, the District Court may make an order (a "Civil Order") prohibiting the respondent from doing anything specified in the order if the court is satisfied that—*
> *(a) the respondent has behaved in an anti-social manner,*
> *(b) the order is necessary to prevent the respondent from continuing to behave in that manner, and*
> *(c) having regard to the effect or likely effect of that behaviour on other persons, the order is reasonable and proportionate in the circumstances.*
>
> [emphasis added]

The rights at issue

43. The Respondent has framed his complaint about the Order by reference to its effect on his right of freedom of expression as guaranteed by Articles 40.3 and 40.6.1 of the Constitution. This right is protected subject to public order. Given the content of the Respondent's preaching, it is surprising that no reference is made to Article 44, but nothing turns on this omission in circumstances where the proportionality analysis is effectively the same in relation to manifestation of religion/belief as it is in relation to freedom of expression: in *Murphy v. IRTC* [1999] 1 IR 12, both freedom of religion and freedom of expression were invoked, but the proportionality assessment was the same. Clearly, public speaking is protected by Articles 40.3 and 40.6.1, with the latter primarily concerned with public activities: *Murphy*, 24-25.

The appropriate test

44. In their Notice of Appeal, the Second and Third Appellants argue that the High Court erred in applying the proportionality test applied in *Heaney v. Ireland* [1994] 3 IR 593

following *Murphy*. It is argued that the rationality test in *Tuohy v. Courtney* [1994] 3 IR 1 was the appropriate test. With respect, IHREC does not agree.

45. The respective areas of application of the *Heaney* and *Tuohy* tests is described by the authors of *Kelly: The Irish Constitution* (Bloomsbury Dublin 2018) as being pervaded by a '*general confusion and lack of clarity*' (at p 1507, [7.1.98]). What can at least be said with certainty is that while both tests developed to assess the impact of legislation, only one has been applied to assess the proportionality of individual quasi-judicial and judicial decisions. This is an assessment of proportionality in what this Court in *Collins v. DPP* called '*the constitutional law sense*', and as Kennedy J observed in that case, '*[t]his is the type of proportionality spoken of in Heaney v. Ireland*.' Further, IHREC observes that section 115(1)(c) itself expressly mandates a proportionality assessment, one which incorporates, as the *Heaney* test does, a public interest element.

46. Under section 115(1), a Civil Order must be necessary to prevent continuance of the subject's anti-social behaviour (as defined in section 113). As well as being an express statutory requirement, necessity is an ingredient of proportionality: a measure, to pass a proportionality test, must impair the right concerned as little as possible, or, put another way, it must impair the right only to the extent that is necessary. This latter framing is reflected in the provisos in Articles 8-11 ECHR.

Proportionality and preventive orders

Irish case law

47. In the absence of Irish authority on the framing of preventive orders under Part 11 of the 2006 Act, IHREC refers the Court again to the High Court's consideration of the order made in *Mooney v. DPP*, cited above. As Phelan J observed in her judgment below, the analogy between the Part 11 regime and section 10 of the Non-Fatal Offences against the Person Act 1997 is not a perfect one, and in addition, there are considerations of distributive proportionality in play in sentencing cases which have less relevance here. Nevertheless, Simons J's consideration of the order in *Mooney* is a domestic example of a proportionality assessment of an essentially preventive order, and in that sense it has value as a guide to the determination of the issues in this case.

Simons J found that two aspects of the Order made were disproportionate: first, its duration, which was for life:

> *41. … [T]he purported imposition of lifetime restrictions on the movements of the Applicant is disproportionate. The making of an order represents an interference with Applicant's right to liberty and/or right to free movement within the State. It follows from the judgments in Meadows v. Minister for Justice and Equality that where a measure interferes with a person's constitutional rights, then the court will consider the proportionality of the measure. To be lawful, the effect on constitutional rights must be proportionate to the objective of the measure. A decision-maker will be shown a significant margin of appreciation in this regard. The judgment in Collins v. Director of Public Prosecutions [2018] IECA 381 (discussed at paragraphs 24 to 26 above) provides a recent example of the proportionality test being applied to criminal sentencing.*
>
> *42. It is an express requirement of section 10(3) that the period of the order be specified. Whereas there is no rule of thumb which requires that there be a fixed mathematical relationship between the length of the specified period and the length of the period of imprisonment, if any, imposed, the specified period must be proportionate to the severity of the offence of harassment.*
>
> *43. On the facts of the present case, the offence was dealt with as a minor offence before the District Court. The maximum term of imprisonment which could be imposed was twelve months. In the event, a sentence of nine months imprisonment, with the final seven months suspended, was imposed. All of this gives a sense of the severity of the offence. The imposition of lifetime restrictions on the movements of the convicted offender is out of all proportion to this.*

48. The second aspect of the Order found to be disproportionate was its geographical scope (at paragraphs 45-46):

44. …[T]he gegraphical scope of the order, which involves all areas within a radius of eight kilometres, is also disproportionate. The principal objective of the making of an order under section 10(3) is to afford some protection to the injured party from further acts of harassment. The injured party has the reassurance of knowing that if the offender were to repeat the type of behaviour of which he or she has been convicted under section 10(1), then there would be an immediate sanction applicable pursuant to section 10(4).

45. There must, however, be some proportionality between the benefit to the injured party and the disbenefit to the convicted offender. On the facts of the present case, the balance weighs too heavily against the Applicant. The exclusion zone purportedly imposed, which involves an area within a radius of eight kilometres, is excessive. Whereas it may be proportionate to ensure that an offender does not approach the immediate vicinity of either the place of residence or employment of an injured party, an order which has the practical effect of exiling the Applicant from his home town is disproportionate. The purpose of making an order should be to protect an injured party from further acts of harassment. It is not intended to ensure that the injured party will never again have sight of the offender. The practical reality of life in a small town is that the paths of individuals will inevitably cross from time to time.

Case law from the UK on proportionality of preventive orders

49. IHREC refers the Court to jurisprudence from the UK which demonstrates how other courts faced with similar questions have approached the issue.

50. In *R v. Boness*, cited above, the Court of Appeal of England and Wales had this to say on the requirement that an ASBO be necessary to protect people against anti-social acts (at paragraph 29), a requirement also present in the Irish legislation:

> *Following a finding that the offender has acted in an anti-social manner (whether or not the act constitutes a criminal offence), the test for making an order prohibiting the offender from doing something is one of necessity. Each*

separate order prohibiting a person from doing a specified thing must be necessary to protect persons from further anti-social acts by him. Any order should therefore be tailor-made for the individual offender, not designed on a word processor for use in every case. The court must ask itself when considering any specific order prohibiting the offender from doing something, "Is this order necessary to protect persons in any place in England and Wales from further anti-social acts by him?"

51. Considering the terms of an ASBO which included a prohibition from '[e]*ntering any public car park within the Basingstoke and Deane Borough Council area, except in the course of lawful employment*,' the Court found that this was disproportionate because it did not allow Mr Boness to park his own vehicle in a public car park or, for example, to be a passenger in a vehicle driven into a public car park in the course of a shopping trip, in the absence of evidence showing that he had committed vehicle crime in car parks.

52. Another term of the ASBO prohibited '[i]*n any public place, wearing, or having with you anything which covers, or could be used to cover, the face or part of the face. This will include hooded clothing, balaclavas, masks or anything else which could be used to hide identity, except that a motorcycle helmet may be worn only when lawfully riding a motorcycle.'* Again, the Court found the terms of this prohibition too wide, resulting in a lack of clarity and consequences that are not commensurate with the risk which the prohibition sought to address. The phrase 'having with you anything which . . . could be used to cover the face or part of the face' covered a vast number of items, and it seemed that Mr Boness would potentially be in breach of the order were he to wear a scarf or carry a newspaper in public. By way of general guidance, the Court observed (at paragraph 38):

Not only must the court before imposing an order prohibiting the offender from doing something consider that such an order is necessary to protect persons from further anti-social acts by him, the terms of the order must be proportionate in the sense that they must be commensurate with the risk to be guarded against. This is particularly important where an order may interfere

with an ECHR right protected by the Human Rights Act 1998, eg arts 8, 10 and 11.

53. The case of *R v. Brain* [2020] EWCA Crim 457 concerned a man who deceived and stole from women while pretending to be an ex-soldier on dating websites. He was convicted and given a Criminal Behaviour Order prohibiting him from accessing or using any internet based dating or social networking sites. By way of a general observation, the Court of Appeal of England and Wales said (at paragraph 30):

> *In general terms, it is non-contentigous that CBOs are aimed at prevention not punishment, should be proportionate and targeted at the relevant behaviour and capable of being complied with and clearly understood.*

54. On the facts, the Court found the CBO to be disproportionate (at paragraphs 38-39):

> *In our judgment, there is some force in the challenge to the blanket prohibition on the use of social networking sites, in particular so far as that prohibition may inhibit Mr Brain's employment prospects. We consider, therefore, that, subject to the granting of leave and extension of time, a variation to Prohibition 1 is justified such that the use of social networking sites by Mr Brain will be permitted for employment-related purposes. We would therefore suggest that the drafting of Prohibition 1 is altered so that the prohibition reads now: "Access or use any internet based dating or social networking sites, the latter save for employment-related purposes."*
>
> *For the avoidance of doubt, the ban on the use of internet-based dating sites is absolute.*

Case law from the European Court of Human Rights

55. The Respondent has not pleaded the European Convention on Human Rights Act 2003, but jurisprudence of the Strasbourg Court can nevertheless provide normative guidance in the consideration of constitutional rights which correspond to rights protected by the Convention: *DPP v. Gormley and White* [2014] 2 IR 591, 609. In this context, IHREC

refers to the admissibility decision in *Gough v. United Kingdom* [dec], App No 2153/15, 5 July 2018. The case concerned a complaint by a 'naked rambler' that his prosecution for violation of an English ASBO that he not appear nude in public violated his right to freedom of expression in Article 10 ECHR. A similar previous complaint about his prosecution in Scotland (*Gough v. UK*, App No 40327/11, 28 October 2014) had been dismissed by the Court, which had found no violation of Article 10 on the grounds that the interference in his rights had been provided for by law and was necessary in a democratic society for the protection of the rights of others. The Court found Mr Gough's second complaint inadmissible for failure to exhaust domestic remedies but also because it was manifestly ill-founded. For our purposes in considering the outcome of the *Tallon* case, the terms of the ASBOs at issue in Gough are instructive. They required Mr Gough not to appear:

> *"...in any place or venue to which the public have access other than his private dwelling without wearing sufficient clothing to cover his genitalia and buttocks save ... where there is an expectation of a degree of nakedness, such as a changing room, a beach where naked bathing is authorised or a medical examination room."*

56. The Strasbourg Court noted, at § 70, that the ASBOs against Mr Gough were *'designed to correspond specifically to the applicant's situation.'*

The Respondent's anti-social behaviour

57. In assessing whether the Order in this case corresponded sufficiently to the Respondent's situation, it is necessary to consider what he did that people found anti-social. In the words of section 113, what was the behaviour that caused significant or persistent alarm or distress, or that significantly or persistently impaired people in the use or enjoyment of their property?

58. The adult behaviour warnings issued to the Respondent under section 114 relate, for the most part, to excessively loud preaching and offensive commentary:

    a. 107251: 'Excessively loud preaching and commentary', 18 June 2020;

b. 107252: ‘Excessively loud and continuous preaching and commentary’, 7 July 2020;
c. 107253: ‘Excessively loud noise and commentary’, 8 July 2020;
d. 107254: ‘Excessive loud and aggressive public speaking’, 22 July 2020; and
e. 107255: ‘Loud and continuous preaching of a very homophobic nature which was very upsetting.’ 22 July 2020.

59. The transcripts paint a similar picture. The form — the volume and tone — of the Respondent’s preaching was mentioned in the evidence of Paula Kehoe (Transcript, 31 August 2020, p 15, l 1), Diana Donnelly (p 16, ll 22-23), Catherine Stack (p 18, ll4-7) 10-11; Louise Carley (p 20, ll 22), Siobhan Kearney (p 25, ll 6, p 10, ll 16-17) and Richard Connolly, (p 26, l 29).

60. The persistence of the Respondent’s preaching was mentioned in the evidence of Maeve Glover (p 13, l 15, 18-21), Paula Kehoe (p 14, ll 15-30), Diana Donnelly (p 16, ll 6-8, 20-21), Catherine Stack (p 17, ll 28-31), Louise Carley (p 21, ll 15-19) and Eddie Macken (p 23, l 6), Patrick O’Connor (p 24, ll 11-12), Siobhan Kearney (p 25-26, ll 33-1) and Richard Connolly (p 27, ll 12-13).

61. The content of his preaching also caused distress. His comments about abortion are mentioned in evidence of Maeve Glover (p 13, l1 1-4), Paula Kehoe (p 14, ll 18-22) and Eddie Macken (p 22, 15-22). The Respondent’s views on women in society are mentioned in the evidence of Maeve Glover (p 13, ll 1-4), Paula Kehoe (p 14, ll 18-22), Catherine Stack (p 18, ll 21-34) and Eddie Macken (p 22, ll 15-22). His homophobic comments are mentioned in the evidence of Paula Kehoe (p 14, 18-22, p 15, ll 15-17), Catherine Stack (p 18, ll 6-9, 21-34), Patrick O’Connor (p 24, ll 5-6, 15-16) and Richard Connolly (p 26, 27-29). Their evidence was not meaningfully contested and was accepted by the District Court.

62. Importantly, there was no evidence that recording by the Respondent was anti-social in the sense that that term is defined in section 113.

63. On the basis of the warnings and the evidence, the concern of people in Wexford about the Respondents preaching seems to have been chiefly related to volume, persistence

and content relating to abortion, women and homosexuality. The fact that the preaching was taking place through an amplifier and in a public place was central to these concerns.

The Civil Order is disproportionate

64. Considering the Order made on 31 August 2020 by reference to the evidence given and the jurisprudence set out above, IHREC makes the following observations:

a. Although a submission was made to the effect that the application for a 'Civil Order' was a measure of last resort and there was ample evidence that successive adult behaviour warnings had been ignored, the underlying cause of the Respondent's anti-social behaviour does not seem to have been investigated so that the Court could be assured that no factor, for example addiction or mental ill-health, was activating the Respondent's conduct which, if addressed, might make the imposition of a Civil Order unnecessary;

b. While section 115(1)(c) expressly requires that the Civil Order be 'reasonable and proportionate', it does not appear from the transcript that the section was ever opened to the District Court, or that it was provided with the relevant statutory provisions before it was asked to make the Order. The statutory requirements of reasonableness and proportionality were not addressed in submissions by Superintendent Doyle;

c. A general ban on 'public speaking' is disproportionate to the aim of preventing the Respondent continuing his anti-social behaviour. It would have been sufficient, having regard to the mischief sought to be prevented, to prohibit him public speaking or preaching in public places within a zone clearly identified on a map of Wexford. The concept of a public place is a familiar one, but if further specificity were necessary, the model of section 3 of the Criminal Law (Public Order) Act 1994 could have been used to add further specificity;

d. Given the concerns expressed about the volume of the Respondent's public speaking, he might have been prohibited from being in possession of a voice amplifier in a public place;

e. There was no evidence that the Respondent's recording was anti-social behaviour within meaning of s.113. It was not subject of any adult behaviour warnings. In IHREC's submission there was no basis for prohibiting it in the Civil Order; and

f. The learned High Court judge suggested that content restrictions could have been imposed on the Respondent's preaching. IHREC agrees, provided that these could have been framed with sufficient specificity to comply with the principle of legal certainty. The parameters of such restrictions could and should have been considered in advance by Gardaí and explored at the hearing to ensure that they would actually have been effective. Plainly, nothing would be achieved by imposing content restrictions if the evidence were that the Respondent would or could not have complied with them. If that were the case, a blanket prohibition would have been proportionate. In this regard, IHREC notes the judgment of the High Court of England and Wales in *The Church of Jesus Christ of the Latter Day Saints and Others v Price* [2004] EWHC 3245 QB, a case about an application for an ordinary civil injunction by the Mormons in England against a Church of England preacher who caused a nuisance by haranguing people attending Mormon meetings:

> *196.. The question for me is whether, in the present case, it is necessary to restrain the defendant's conduct by an exclusion zone prohibiting him from coming within 30 metres of any of the properties of the claimants. Would the alternative, an injunction to prevent him from continuing the nuisances and harassments specified in the pleading suffice?*
>
> *197.. Burris v. Adzani provides guidance. First, it is not a valid objection to an "exclusion zone" injunction, that the conduct to be restrained is not in itself tortious. What is crucial is whether such an order is necessary for the protection of a claimant's legitimate interest; see Sir*

Thomas Bingham M.R. at page 1377. His Lordship stated that in considering the imposition of an exclusion order there are two interests to be reconciled. One is that of the defendant, whose liberty must be respected up to the point at which his conduct infringes or threatens to infringe the rights of the claimant. No restraint should be placed on him which is not judged to be necessary to protect the rights of the claimant. The claimant, however, has an interest which the court must be astute to protect and the rule of law requires that those whose rights are infringed should seek the aid of the court. Respect for legal process can only suffer if those who need protection fail to get it.

198.. Sir Thomas Bingham MR stated that ordinarily a victim will be adequately protected by an injunction which restrains the tort which has been or is likely to be committed. It may, however, be clear on the facts of a particular case, that if the defendant approaches the vicinity of the plaintiff's home, he will succumb to the temptation to enter it or to abuse or harass the claimant, or he may loiter outside the house in a manner which may be highly stressful and disturbing to a claimant. In such a situation his Lordship stated that a court may properly judge that, in the claimant's interests, and also, indirectly the defendant's, a wider measure of restraint is called for.

…

201.. On the facts that I have found, given the defendant's belief, his behaviour in the past, and his responses to requests to desist, I conclude that if he approaches the vicinity of the claimant's properties he will, adapting Sir Thomas Bingham's words, succumb to the temptation to engage in conduct, which is a nuisance, or which harasses members of the church or those visiting church premises. Accordingly, I have concluded that in the present case an exclusion zone order is necessary. However, in relation to the Exhibition Road premises it should only apply to the side of the road on which the claimant's premises are situated, which from the map appears to be the east side of the road.

[emphasis added]

65. Accordingly, IHREC respectfully agrees with the High Court that the Civil Order made against the Respondent on 31 August 2020 was impermissibly broad and therefore disproportionate, albeit that it has a concern that any content restriction imposed may not be effective in preventing continuation of the Respondent's anti-social behaviour.

F. CONCLUSION

66. For all of the reasons above, IHREC submits that the High Court was entitled to not to dismiss the proceedings on discretionary grounds on the basis that alternative remedies had not been pursued. IHREC further submits that the Civil Order made against the Respondent on 31 August 2020 was insufficiently precise to protect his right to trial in due course of law under Article 38.1 of the Constitution. Finally, IHREC submits that the prohibitions contained in the order interfered in the Respondent's rights more than necessary to prevent him continuing his anti-social behaviour and to protect the rights of other people in Wexford. For that reason, the Order was *ultra vires* section 115(1) of the 2006 Act. The Civil Order was properly quashed, and similarly, the Respondent's convictions cannot stand.

67. IHREC's submission is therefore that the judgment of the Court below should be affirmed, and that these appeals should be dismissed. It is unnecessary in the circumstances to address the Respondent's arguments as to the constitutionality of 115 and 117 of the 2006 Act.

Colin Smith BL
Patrick Gageby SC

16 January 2023

8,193 words