THE SUPREME COURT

Supreme Court record no: S:AP:IE:2022:000110

BETWEEN:

THE PEOPLE
(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

AND

GARY McAREAVEY

AND

CAOLAN SMYTH

APPELLANTS

AND

THE IRISH HUMAN RIGHTS & EQUALITY COMMISSION

AMICUS CURIAE

SUBMISSIONS ON BEHALF OF THE AMICUS

INTRODUCTION

1. The test for determining the admissibility of unlawfully obtained evidence, as set out in the case of *JC*,[1] was the result of a careful balancing of constitutional rights and values.

[1] [2017] 1 I.R. 417.

2. The test seeks to vindicate the rights of the accused, as well as the rights of the community; to deter against future breaches of rights; to protect the administration of justice from the taint of misconduct; and to uphold respect for the rule of law.

3. It is submitted that accepting the reasoning of the Special Criminal Court and the Court of Appeal, the subject-matter of these appeals, would effectively amount to an abandonment of the *JC* test.

4. By operating a regime of retention and accessing of phone data under the Communications (Retention of Data) Act 2011 ('the 2011 Act') which was contrary to EU law, the State authorities breached the privacy rights of the Appellants under the Charter of Fundamental Rights of the European Union ('the Charter').

5. In the circumstances, the *Amicus Curiae* ('the Commission') respectfully submits that it was incumbent on the trial Court to apply the *JC* test to the admissibility of the Call Data Records, and to assess whether this evidence had been obtained in deliberate and conscious violation of the Appellants' rights.

6. The Commission makes five submissions in this regard:

    (1) ***First***, evidence obtained in breach of a Charter right must be assessed by reference to the *JC* test in the same way as evidence obtained in breach of a constitutional right. This is necessitated by the Constitution and the EU law principles of equivalence and effectiveness;

    (2) ***Second***, in the circumstances here, it seems to the Commission that the evidence was, in any event, also obtained in breach of the constitutional right to privacy. It should be clarified that, notwithstanding that Charter rights are at issue in these Appeals, it is necessary to address this issue in light of the Respondent's erroneous suggestion that the principle of equivalence will only apply where a breach of the Appellants' constitutional right is demonstrated;[2]

[2] Respondent's Written Submissions, §44 (misstating the question arising for the Court); see also §61.

(3) ***Third***, certain aspects of the reasoning of the lower courts would, if upheld, entirely undermine *JC* and render it wholly ineffective;

(4) ***Fourth***, the Commission has substantial concerns about the consequences of the failure of the trial Court to conduct a *JC* analysis in the circumstances arising here; and

(5) ***Fifth***, and flowing from this, even if the Court is of the view that *JC* is not applicable by reference to the interference with the Appellants' rights, it is respectfully submitted that *JC* ought to have been applied in any case as the circumstances arising engage a fundamental rationale of *JC*.

THE ADMISSIBILITY OF EVIDENCE OBTAINED IN BREACH OF CHARTER RIGHTS MUST BE ASSESSED BY REFERENCE TO *JC*

7. The Commission submits that the admissibility of evidence obtained in breach of a Charter right can only be assessed under the *JC* test.

8. This is for three reasons.

A breach of the Charter breaches the Constitution

9. In the ***first*** instance, it is the Commission's view that a breach of the Charter does actually involve a breach of the Constitution.

10. Article 29.4.4º of the Constitution enshrines what has been described as a '*positive affirmation of Ireland's commitment to the European Union*'[3] and states that '*Ireland **affirms its commitment** to the European Union within which the member*

[3] GW Hogan, GF Whyte, D Kenny and R Walsh, *Kelly: The Irish Constitution* (5th edn, 2018), §5.3.48; see also, §5.3.59.

states of that Union work together to promote peace, shared values and the well-being of their peoples'.[4]

11. Meanwhile, Article 29.4.5º entitles the State to ratify the Treaty of Lisbon, and to be a '*member of the European Union established by virtue of that Treaty*'.

12. In turn, Article 6(1) TEU provides that the Union '*recognizes the rights, freedoms and principles set out in the Charter*', which Charter '*shall have the same legal value as the Treaties*'.

13. It appears to the Commission that any breach by Ireland of Union law conflicts with Ireland's commitment to the Union in Article 29.4.4º, and must therefore be treated as a breach of this constitutional provision.

14. At the very least, when—as with the Charter—the particular provision of EU law confers a foundational right on an individual, which right has the same status as the Treaty, that right must be regarded as having constitutional status by virtue of Article 29.4.4º.

15. This has the further consequence that any breach of the particular right must be regarded as a breach of a constitutional right.

A breach of a Charter right is equivalent to a breach of a constitutional right

16. ***Second***, in the alternative, the Commission submits that a breach of a Charter right must be regarded as equivalent to breach of a constitutional right.

17. While it is well-established that rules of admissibility of evidence are subject to national procedural autonomy, it is equally well-established that, as was held in *XC*, the duty of sincere cooperation imposed on States by Article 4(3) TEU has the consequence that the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those

[4] Emphasis added here and throughout unless otherwise indicated.

governing similar domestic actions (equivalence) and must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (effectiveness).[5]

18. This duty of sincere cooperation is reinforced by Article 19 TEU, which imposes on Member States an obligation "*to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*."

19. In essence, the principle of equivalence requires that all the rules applicable to actions apply without distinction to actions alleging infringement of Union law and to similar actions alleging infringement of national law.[6]

20. Thus, the principle of equivalence prohibits a Member State from laying down less favourable procedural rules for actions for safeguarding rights that individuals derive from EU law than those applicable to similar domestic actions.[7]

21. When assessing whether equivalent procedural rules are required, the national court '*must consider both the purpose and the essential characteristics of allegedly similar domestic* ***actions***'.[8]

22. Contrary therefore to the erroneous analysis proposed by the Respondent,[9] it is not the case that for the principle of equivalence to apply to breach of a Charter right, it must be demonstrated that there would have been a ***breach*** of a constitutional right. Rather, the equivalence assessment takes place at the level of the ***cause of action*** at issue.

23. An interesting example of how the exercise is to be conducted is found in Case C-118/08 *Transportes Urbanos y Servicios Generales SAL v Administración del Estado*.[10] There, the CJEU ruled (§48) that a requirement of exhaustion of all domestic remedies could not be applied to an action for damages alleging a breach

[5] Case C-234/17 *XC* EU:C:2018:853, §22.
[6] Case C-326/96 *Levez v TH Jennings (Harlow Pools) Ltd* EU:C:1998:577, §41.
[7] *XC*, §25.
[8] *Levez*, §43.
[9] Respondent's Written Submissions, §44 (misstating the question arising); see also §61.
[10] EU:C:2010:39.

of EU law where such a rule was not applicable to an action for damages against the State alleging a breach of the Constitution. The CJEU reasoned that the two actions had '***exactly the same purpose***, *namely compensation for the loss suffered by the person harmed as a result of an act or an omission of the State*' (§37), while, with respect to their '*essential characteristics*', the only difference in the two causes of action at issue was that one was based on a CJEU ruling and the other on breach of the Constitution, which could not '*suffice to establish a distinction between those two actions in the light of the principle of equivalence*' (§44).

24. The *XC* case is also of interest as it involved consideration of whether a breach of the Charter could be regarded as equivalent to a breach of the ECHR in the specific context of *res judicata* and re-opening of trials where a breach of the ECHR had been identified after the conclusion of the trial.

25. In concluding that it could not, the CJEU identified a number of characteristics of Charter rights which it regarded as distinguishable from ECHR rights (see §§31—48) in the context of *res judicata*, including the following:

    (1) '*EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States … and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves*' (§36);

    (2) The Charter is '*at the heart*' of the EU legal structure, while respect for Charter rights is '*a condition of the lawfulness of EU acts, so that measures that are incompatible with those rights are not acceptable in the European Union*' (§37);

    (3) The EU has a judicial system that can ensure consistency and uniformity in the interpretation of EU law (§39), with national courts which must '*ensure the* ***full application*** *of EU law in all Member States*' and '***ensure judicial protection of an individual's rights under that law***' (§40);

(4) National courts applying provisions of Union law:

> '*are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and it is not necessary for that court to request or to await the prior setting aside of that provision of national law by legislative or other constitutional means*' (§44).

26. These characteristics were relevant to assessment of a rule on *res judicata*, given that, unlike with the ECHR, they had the consequence that Charter rights could be vindicated '*before a national decision with the force of res judicata even comes into existence*' (§46).

27. The CJEU added that this was the '*constitutional framework*' within which Charter rights were to be interpreted and applied (§§45—46).

28. Applying the established parameters of equivalence here, it appears to the Commission that, in terms of ***purpose***, an application to exclude evidence obtained in breach of constitutional rights has exactly the same purpose as an application to exclude evidence obtained in breach of Charter rights, namely: vindication of the rights at issue; deterring future breaches of rights; and respect for the rule of law.

29. Indeed, as Charter rights are supreme over constitutional rights, they enjoy a greater claim for vindication than constitutional rights. As observed by McGrath:

> '*Given the primacy of EU law, it is difficult to see how a less protective approach could be applied to rights protected under the Charter than to rights protected under the Constitution*'.[11]

30. In terms of ***essential characteristics***, no distinction can be drawn between breach of a constitutional right and breach of a Charter right. In terms of their content,

[11] *McGrath on Evidence* (2020, 3rd edn), §7-135.

Charter rights are derived from '*the constitutional traditions*' of Member States (Preamble, Article 52(4)).

31. Further, unlike the rights under the international ECHR—and applying even only certain of the characteristics identified in *XC* in the context of *res judicata*—constitutional and Charter rights both have primacy over other laws and direct effect; both are a condition of lawfulness of other laws; both are enforced by national courts which must ensure their "*full application*" and which must set aside conflicting provisions of national law; and both can be regarded as part of a "*constitutional framework*".

32. Thus, for the purpose of exclusion of evidence, to refuse to apply *JC* to evidence obtained in breach of a Charter right would be to draw a distinction ***solely*** on the basis that the complaint was based on the Charter rather than the Constitution, a distinction that is not permissible (see *Transportes Urbanos*).

33. It follows that the admissibility of the Call Data Records must be assessed by reference to *JC* in order to ensure compliance with the EU law principle of equivalence.

34. It should also be added that, in an attempt to counteract this logic, the Respondent suggests that non-compliance of the 2011 Act with conditions in Directive 2002/58/EC ('the Directive'), is '*much more reminiscent of a determination in Irish law as to whether a measure is ultra vires a statutory power, than a determination as to constitutional rights*'.[12]

35. The Court of Appeal in its recent decision in *DPP v Dwyer*,[13] adopted a similar analysis, suggesting that if the Charter had been '*directly breached*' by the 2011 Act, '*perhaps a JC test would be appropriate to satisfy the requirements of equivalence and effectiveness*', but this was not the case where there had been a '*breach of a provision of a Directive read in light of the Charter*'.

[12] Respondent's Written Submissions, §§46—47.
[13] [2023] IECA 70, §129.

36. Respectfully, this reasoning is unpersuasive.

37. It is artificial to suggest that a breach of the Directive means that rights have merely been breached '*indirectly*'. The Charter protects privacy of communications and personal data. The Directive was enacted, in part to ensure a minimum standard of protection of those rights (e.g., Recitals (5), (8), (11), (12)). If the protections contained in the Directive are breached, it necessarily follows that the underlying Charter rights have been breached.

38. In any event, if evidence is collected in accordance with the 2011 Act, which Act is incompatible with the Directive, it cannot be said that any interference with the underlying Article 7 and 8 privacy rights are '*provided for* ***by law***' as is required by Article 52(1) of the Charter; it therefore follows that a direct breach of the Charter undoubtedly arises.

The requirement for the application of *JC* is bolstered by the principle of effectiveness

39. ***Third***, the Commission's position on the requirements of EU law is bolstered by the principle of effectiveness of EU law.

40. In *La Quadrature du Net*,[14] the CJEU held that in the context of admissibility of evidence, the principle of effectiveness compels Member States to *'prevent information and evidence obtained unlawfully from unduly prejudicing a person who is suspected of having committed criminal offences'.*

41. Even more robustly, in *WebMindLicenses*,[15] the CJEU held, in respect of telecommunications intercepted and emails seized in a criminal procedure and sought to be used in a tax administrative procedure, that if the national court found that the taxable person did not have an opportunity to comment on that evidence, or if the evidence was obtained in the criminal procedure or used in the

[14] Joined Cases C-511/18 *La Quadrature du Net and Others*, §225
[15] Case C-419/14, *WebMindLicenses* Kft, EU:C.2015:832, §91.

administrative procedure '*in breach of Article 7 of the Charter, it must disregard that evidence*'.

42. Generally, the obligation of effectiveness is far-reaching, requiring '***full*** *effectiveness*' of Union law.[16] It also extends to removing '*procedural disadvantages*'[17] that may impede the effectiveness of Union law[18] or '*jeopardise the attainment*' of Union objectives.[19]

43. In the *Factortame* case, the CJEU stated that the principle required the national courts to have '*the power to* ***do everything necessary***' to ensure compliance with Union law.[20]

44. While the rationale or rationales for the operation of an exclusionary rule of evidence have not been fully developed in the CJEU caselaw, it seems inevitable that the CJEU would require that evidence gathered in conscious or reckless breach of EU law protecting fundamental rights would be excluded, not just in order to achieve equivalence in respect of protection of Charter rights, but as an aspect of the principle of effectiveness of Union law.

45. Where EU institutions have set boundaries on potential interference with fundamental rights, and where the CJEU has reaffirmed those boundaries in its caselaw, there is an imperative to ensure that seriously culpable breaches of those boundaries will result in exclusion of evidence. This is particularly so, where a Member State may be seen to have simply ignored EU law. In such a case, exclusion of evidence would be warranted to deter future breaches of EU law; to ensure the primacy of EU law; and to uphold the rule of law, which is a foundational principle upon which the Union is built.[21]

[16] Case C-268/06 *Impact* EU:C:2008:223, §99.
[17] Case C-268/06 *Impact* EU:C:2008:223, §51.
[18] Case C-268/06 *Impact* EU:C:2008:223, §36.
[19] Case C-439/08 *VEBIC v Raad voor de Mededinging* EU:C:2010:739, §§57-58.
[20] Case C-213/89 *R v Secretary of State for Transport Ex p Factortame Ltd* EU:C:1990:257, §20.
[21] Case C-294/83 *Parti ecologist "Les Verts" v European Parliament* EU:C:1986:166, §23.

46. Accordingly, the rationale for the exclusion of evidence in EU law must extend beyond the protection of the rights of an individual accused to include recognition of the need to ensure the effectiveness of EU law including Charter rights.

47. Otherwise, it simply could not be said that the national court was doing '*everything necessary*' to ensure compliance with EU law (*Factortame*).

Summary

48. In summary, therefore, it is respectfully submitted that evidence obtained in breach of Charter rights must be subject to the same admissibility assessment as evidence obtained in breach of constitutional rights.

THE EVIDENCE WAS ALSO OBTAINED IN BREACH OF CONSTITUTIONAL RIGHTS

Relevance

49. The Commission fully accepts that the focus of this appeal is on rights derived from the Charter.

50. However, mindful of this Court's comments in *Clare County Council v McDonagh*,[22] the Commission respectfully suggests that it may be of assistance to the Court for the position under the Constitution to also be addressed briefly.

51. Moreover, as noted above, the Commission does not accept the Respondent's framework for analysing equivalence. If, however, as the Respondent suggests, it is incumbent on the Appellants to demonstrate a breach of a constitutional right in order to demonstrate that the principle of equivalence applies, it is respectfully submitted that this is possible.

General framework

[22] [2022] ILRM 353 (Hogan J) §54.

52. There is no doubt that the constitutional right to privacy is engaged here. This is clear from the comments of Hogan J in *Schrems*,[23] in which he observed (§47):

> '*As far as Irish law is concerned, the accessing of private communications by the state authorities through interception or surveillance directly engages the constitutional right to privacy: see, e.g., Kennedy v. Ireland [1987] I.R. 587; The People (Director of Public Prosecutions) v. Dillon [2002] 4 I.R. 501 and Idah v. The Director of Public Prosecutions[2014] IECCA 3, (Unreported, Court of Criminal Appeal, 23rd January, 2014). As Hamilton P. noted in Kennedy v. Ireland, this constitutional right is underscored by the Preamble's commitment to the protection of the "dignity and freedom of the individual" and the guarantee of a democratic society contained in Article 5 of the Constitution.*'

53. There is equally no doubt that interference with constitutional rights is permissible in certain, specified circumstances.

54. As was also noted by Hogan J in *Schrems* (§§49—50):

> '*Naturally, the mere fact that these rights are thus engaged does not necessarily mean that the interception of communications by state authorities is necessarily or always unlawful. The Preamble to the Constitution envisages a "true social order" where the "dignity and freedom of the individual may be assured", so that both liberty and security are valued.* ***Provided appropriate safeguards are in place****, it would have to be acknowledged that in a modern society electronic surveillance and interception of communications is indispensable to the preservation of state security. It is accordingly plain that legislation of this general kind serves important – indeed, vital and indispensable – state goals and interests*
>
> *…*

[23] [2014] 3 I.R. 75, §§ 47—49.

The importance of these rights is such nonetheless that the interference with these privacy interests ***must be in a manner provided for by law*** *and any such interference must also be proportionate.'*

55. Meanwhile, McKechnie J said in *Digital Rights*[24] that:

'*... a right to privacy is not absolute. In particular, it may need to be balanced against the duty of the State to investigate and detect serious crime… A person has a right not to be* ***unjustifiably*** *surveilled; such is therefore a general right to confidential communication.'*

56. It is apparent from these statements that a number of requirements must be satisfied if any interference with the constitutional right to privacy is to be upheld, but, in particular, any interference must be accompanied by '*appropriate safeguards*' and '*provided for by law*'.

57. Neither of these requirements has been satisfied here.

The requirement that the interference be 'provided for by law' is not satisfied

58. Considering the latter requirement first, where an interference is conducted pursuant to national legislation that violates EU law, it simply cannot be said that the interference is '*provided for by law*'.

59. To make such a suggestion simply because the legislation has *technically* not been removed from the statute book is not consistent with the rule of law, which forms part of the State's constitutional identity and constitutional fundamentals.[25]

60. The fact that the interference was not conducted '*in a manner provided for by law*' also means that the weighing of the privacy interest urged by the Respondent on the Court[26] simply does not arise; the interference with the privacy interest is, by virtue of its lack of legal basis, automatically unconstitutional.

[24] [2010] 3 I.R. 251, §§ 65—72.
[25] See, e.g., *Costello v Government of Ireland* [2022] IESC 44 (Hogan J), §235.
[26] Respondent's Written Submissions, §61.

The requirement for 'appropriate safeguards' is not satisfied

61. With respect to the requirement of '*appropriate safeguards*' identified in *Schrems*, it is respectfully suggested that the Constitution requires that access to metadata should only be authorised by an independent or judicial authority (which did not arise here).

62. Such a procedural safeguard would be consistent with the reasoning of this Court, in cases such as *Damache*,[27] *Behan*[28] and *Quirke*,[29] in respect of the importance of safeguards protecting privacy.

63. In *Damache*, for example, Denham J emphasised the necessity for the person authorising a search warrant to '*be independent of the issue and act judicially*',[30] reasoning which was endorsed by Charleton J in *Quirke*.[31]

64. Indeed, it appears to the Commission that it inevitably flows from the nature of the constitutional right to privacy as first recognised in *Kennedy v Ireland* that a system of independent authorisation is required. In that case, Hamilton P held that:

> '*The dignity and freedom of an individual in a democratic society cannot be ensured if his communications of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.*'[32]

65. The obvious mechanism to prevent deliberate, conscious and unjustifiable intrusion is a system of prior independent authorisation.

66. Similar principles have consistently been applied in the Convention caselaw. In cases where the processing of personal data was to facilitate the authorities to conduct an investigation, the ECtHR has found that such processing falls within

[27] *Damache v DPP, Ireland and the AG* [2012] 2 I.R. 266.
[28] *DPP v Joseph Behan* [2022] IESC 23
[29] *DPP v Patrick Quirke* [2023] IESC 5.
[30] [2012] 2 IR 266, 283.
[31] [2023] IESC 5, §97.
[32] [1987] IR 587, 593.

the scope of Article 8 and entails interference with the respect for the private life of the person concerned.[33] Interference with private communications must therefore be attended by adequate safeguards, including independent authorisation where appropriate.[34] Lack of independent supervision will be a factor in assessing the proportionality of the interference.[35]

67. Thus, in *Benedik v Slovenia*,[36] the ECtHR held that the legal provisions relied upon by the police to access an IP address provided no protection against arbitrary interference, particularly in the absence of independent supervision of the police powers.

68. A similar analysis can be found the judgment of Roberts CJ in the US Supreme Court case of *Carpenter v United States*.[37] The Court held that phone data, and in particular cell site location data, engages *'a person's expectation of privacy in his physical location and movements'* as well as a reasonable expectation of privacy in respect of communications which a person does not wish to share with third parties. Accordingly, the gathering of the cell site data in *Carpenter* was held to be an unlawful breach of privacy, as it had not been authorised on foot of a search warrant issued by a Judge, upon probable cause.

69. The Supreme Court of Canada has applied similar considerations. In *R v Spencer,*[38] the Court held that the retrieval of an IP address had been unlawful, due to the lack of prior judicial authorisation.

70. While disclosure of phone metadata may be less destructive of privacy than tapping phone conversations, examining the content of a computer, or invading the privacy of a home, it still interferes with privacy in a significant way.

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[33] *Perry v United Kingdom*, 2003, §§ 39-43; *Uzun v Germany*, 2010, §§51—52; *Vukota-Bojić v Switzerland*, 2016, §§ 57-59; *López Ribalda and Others v Spain* [GC], 2019, §94.
[34] *Ben Faiza v France* App no. 31446/12, §73 (in French only), §130.
[35] *Breyer v Germany* App no. 50001/12 30 January 2020, §§ 92—95.
[36] App no. 62357/14, 27 July 2018.
[37] 138 S.Ct. 2206, 22 June 2018.
[38] [2014] 2 S.C.R. 212.

71. Moreover, of course the fact that a right is protected in a particular manner under other rights systems is not determinative of the protection of that right under the Constitution.[39] However, it is submitted that the independent authorisation safeguard recognised as required under the Charter and other fundamental rights regimes is consistent with and already established in other contexts in the constitutional jurisprudence on the right to privacy in this jurisdiction.

ASPECTS OF THE LOWER COURTS' REASONING WHICH UNDERMINE *JC* AND WHICH SHOULD BE REJECTED

72. The Commission is of the view that there are four aspects of the reasoning of the lower courts which, if upheld by this Court, would severely undermine the reasoning in *JC*.

A right to privacy in respect of phone metadata must exist irrespective of the use to which the phone is put

73. ***First***, in the Appellants' cases, the Special Criminal Court and the Court of Appeal found that the privacy rights arising were limited in the extreme, if they existed at all.[40] The fact that the phone data related to short-term use of unregistered phones was held to be relevant, as was the Appellants' failure to assert ownership.

74. The Special Criminal Court also relied on the proposition that there was no right to privacy to commit crime, and so there could have been no breach of the Appellants' privacy rights.[41]

75. It is submitted that such an approach cannot be countenanced in the context of admissibility of evidence, in particular, for the reasons set out by Hardiman J in the Court of Criminal Appeal case of *DPP v Dillon*, as follows:[42]

> *'It was … submitted, briefly, that the protection of privacy in telephone conversations, considered as a constitutional right, could not apply to a*

[39] *Fox v Minister for Justice and Equality* [2021] 2 ILRM 225, §12.10.
[40] [2022] IECA 192, §27
[41] See trial transcript, 22 October 2021, p.1, line 30.
[42] [2004] 4 I.R. 501 at p.513.

conversation which, it turns out, was for the purpose of furthering the commission of a crime…

It seems to us that the status of the interception must be determined ***as of the time of its commencement and cannot change on the basis of what develops during the conversation intercepted.*** *An interception which is unlawful cannot become lawful on the basis of what is heard during it. Nor can an accused person be estopped from raising a question of admissibility of evidence based on unlawful interception on the basis of the illegal purport of the conversation intercepted.* ***If that were permissible it would set at nought the detailed and specific statutory provisions relating to interception because it is only where a conversation evidences unlawful activity that it will be sought to introduce it in evidence****. If a defendant could be so estopped, unlawful interception could take place within impunity so long as it yielded useful evidence, and there would be no practical restriction on unlawful interception which did not yield such evidence because its occurrence would not become known.'*

76. The reasoning of the Court of Appeal in the present case is clearly at odds with the weighty observations of Hardiman J. It is submitted that the reasoning in *Dillon* is to be preferred.

77. The Commission has also been unable to find, in comparative caselaw, any case in which a similar excusatory justification for breaching privacy has been accepted as legitimate.

78. For example, in the Canadian case of *Spencer* cited above, Cromwell J stated as follows:

'[36] The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought… the issue is not whether Mr. Spencer had a legitimate privacy interest in concealing his use of the Internet for the purpose of accessing child

pornography, but whether people generally have a privacy interest in subscriber information with respect to computers which they use in their home for private purposes…'

79. Similarly, in *Benedik* v *Slovenia*,[43] the ECtHR rejected the proposition that there could be no breach of Article 8 in respect of the unlawful disclosure of an IP address, due to the criminal conduct of the accused in his private online activities using the IP address:

'99. The Court reiterates in this connection that sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives, and that protection includes a need to identify the offenders and bring them to justice (see K.U. v. Finland, no. 2872/02, § 46, ECHR 2008-V). However, the questions raised by the Government concerning the applicability of Article 8 are to be answered independently from the legal or illegal character of the activity in question…'.

80. Although some reliance has been placed by the Respondent on the ECtHR case of *Lüdi v Switzerland*,[44] a closer consideration of that case does not support the proposition.

81. In *Lüdi*, there was no issue in respect of the lawfulness of the intercepted telephone conversation. The chief complaint was that the content of the intercepted conversation had been prompted by an undercover police agent, and that this was a stand-alone breach of the right to privacy under Article 8 ECHR. The ECtHR pointed out, however, that the applicant, being aware that he was involved in a significant drug deal, must have been aware that *'he was running the risk of encountering an undercover police officer whose task would in fact be to expose*

[43] App no. 62357/14, 27/07/18 §99.
[44] App no. 12433/86, 15 June 1992.

him.'[45] Hence, there could be no reasonable expectation of privacy in respect of his interactions with the police officer.

82. It should also be emphasised that the proposition relied on by the Respondent and accepted by the trial Court, ignores other rationales for the exclusionary rule: deterrence of future misconduct and protection of the administration of justice from the taint of misconduct. These goals are not diminished by reason of the contingent fact that the unlawfully obtained evidence transpired to have disclosed criminality on the part of a suspect.

83. Furthermore, if accepted, the proposition could be extended to other contexts, in ways which would undermine the vindication of constitutional rights. For example, it could be argued that a dwelling can no longer be said to be inviolable once it is established that it had been used to store drugs.

If the prosecution assert that the phone was used by an accused, it would be a breach of Article 38.1 to require the accused to make admissions in respect of their use of that phone, in order to engage an assessment of their privacy rights

84. The ***second*** aspect of the lower Courts' reasoning about which the Commission has concerns is in relation to the assessment of the privacy interests at issue.

85. The Commission submits that where the Prosecution assert that a particular phone was being used by an accused, then it is appropriate for a trial court, when assessing whether the accused's privacy rights are engaged, to proceed on the basis that the phone was being used by the accused.

86. This is the approach which is most protective of constitutional rights, including the right to privacy, and the right to a fair trial under Article 38.1 of the Constitution.

[45] Ibid., p.15.

87. In particular, in such circumstances, an accused should not be required to elect between two constitutional rights, both of which they are entitled to enjoy. Thus:

(1) The accused should not have to forego the privilege against self-incrimination and make an admission which would assist the Prosecution in proving the case against them, in order to be able to rely on privacy rights within the meaning of *JC* (e.g., by admitting ownership of the phone);

(2) Equally, the accused should not have to forego reliance on privacy rights within the meaning of *JC* (e.g., by not admitting ownership of the phone) in order to rely on the privilege against self-incrimination.

Privacy rights are breached where there is unlawful access to phone data, irrespective of whether that data could have been lawfully gathered in some other way

88. The ***third*** aspect of the reasoning of the lower courts that the Commission regards as being likely to be highly corrosive of the very essence of *JC* is the reasoning of the Special Criminal Court—endorsed by the Court of Appeal —that any independent authority would also have granted access to the Appellants' phone data.[46] This finding contributed to the conclusion that there was no breach of privacy rights and so, no need to proceed to a *JC* assessment.

89. The Commission has not identified, in comparative caselaw, any finding that, if evidence could have been lawfully gathered, a breach of rights could be excused.

90. Indeed, it is implicit in any exclusionary rule, including the *JC* test, that the evidence which is sought to be excluded could have been lawfully gathered. If the evidence could never have been lawfully gathered, then the exclusionary rule applies in any event and without exception.

[46] [2022] IECA 192, §28.

91. Some jurisdictions, such as the United States and Canada,[47] operate an '*inevitable discovery*' exception to the exclusionary rule. In other words, notwithstanding that the evidence was gathered in breach of rights, if it was inevitable that the evidence was going to be discovered anyway, through some other lawful process, then the evidence is admissible.

92. An example, from the leading US Supreme Court authority *Nix v Williams*,[48] was that an ongoing search of a field would, in short order, have uncovered the body of the murder victim, if the accused had not first been induced into an unlawful confession as to the location of the body.

93. However, the '*inevitable discovery*' principle only applies where there is a lawful process which would have uncovered the evidence anyway, rather than a lawful process which the authorities ***could*** have used, if they had not decided to act unlawfully.

94. Thus, in *United States v Mejia*,[49] it was held that the doctrine does not apply where the police had probable cause to search a premises, but made no effort to secure a search warrant. To accept this argument would, in effect, eliminate the warrant requirement entirely.

95. Thus, counterfactuals, of the kind endorsed by the Court of Appeal in this case, are simply excluded from the doctrine.

96. In the recent case of *GE v Commissioner of An Garda Siochana*,[50] this Court cautioned against the deployment of a counterfactual to effectively excuse a breach of a constitutional right. Hogan J rejected the submission that since the authorities could, without difficulty, have secured the lawful detention of the applicant, no damages or only nominal damages should flow from his actual false imprisonment, observing that:

[47] See, e.g., *R v Grant*, 2009 SCC 32.
[48] 467 U.S. 431 (1984).
[49] 69 F.3d 309 (9th Cir. 1995).
[50] [2022] IESC 51, §55.

'save perhaps for purely technical and fleeting instances of false imprisonment, an award of damages for false imprisonment will normally (and should) contain an element of vindicatory damages. Any other conclusion would not only devalue the remedy of false imprisonment, but it would also take from the inherent importance of personal liberty and respect for the rule of law, key ingredients in any free and democratic society.'

97. Thus, the requirement to vindicate a plaintiff for the breach of their right of liberty endured, notwithstanding that the detention was otherwise warranted and could easily have been secured lawfully.

98. It is submitted that these principles—the constitutional requirement to vindicate rights breached, and to protect the rule of law—apply equally in the context of the exclusion of evidence gathered in breach of constitutional rights.

99. In so submitting, it is acknowledged, as O'Donnell J (as he then was) pointed out in *JC*, that different consideration apply in respect of the admissibility of evidence than apply in respect of vindication of rights in the civil context:

'A court, whether criminal or civil, addressing the admissibility of evidence is not engaged in the question of remedying a breach of the right, as a court asked to grant an injunction to restrain a trespass might be. A criminal or civil trial is the administration of justice. A central function of the administration of justice is fact finding, and truth finding. Anything that detracts from the courts' capacity to find out what occurred in fact, detracts from the truth finding function of the administration of the justice.'[51]

100. While acknowledging the distinction, the Commission submits that to excuse a conscious and deliberate breach of rights on the basis that the evidence could have been lawfully secured would undermine the deterrent effect of the exclusionary rule.

[51] Judgment of O'Donnell J, §97.

101. If evidence can always be admitted on the basis that it could have been gathered lawfully, what incentive would there be to act lawfully?

102. In this respect, it is worth recalling Hardiman J's warning, from his dissenting Judgment in *JC*:[52]

> *'Judicial decisions about civil and constitutional rights must consider not only the present state of affairs but also what Ó Dálaigh C.J. described in Melling v. O Mathghamhna and the Attorney General [1962] I.R. 1, at p. 39, as the contingencies of an "improbable but not-to-be-overlooked future". It is important to bear in mind that the powers and immunities conferred on the force publique will continue to be enjoyed by it notwithstanding the changes of government and of political culture, and that the rights which the courts must protect, must be sufficiently protected to endure even in the unpredictable contingencies of "an improbable but not-to-be-overlooked future".*

103. The failure of the trial Court to properly assess whether the State authorities had acted consciously or recklessly in breach of rights, undermines the reliance on the alternative means to lawfully gather the evidence.

104. In this regard, it is added that the present cases can also be distinguished from the case of *DPP v Behan*.[53] *Behan* was a case in which the *proviso* to *JC* was applied, as there was compelling evidence of guilt, quite apart from the fruits of the unlawful search. This Court also noted that while no *JC* analysis had been conducted during the trial (as the trial judge had erroneously held that the search of the dwelling was lawful), there were ample grounds to conclude that the legal error leading to a breach of the right to inviolability of the dwelling was an innocent one on the part of the investigating Gardaí. O'Malley J said:

[52] Judgment of Hardiman J, §152.
[53] [2022] IESC 23.

'… it is clear from the evidence that was given that Detective Superintendent Scott shared the view of Superintendent Donnelly that "independence", under the Act, meant not having already taken any steps in the investigation. While I consider that interpretation to be mistaken, it is one shared by two members of this Court and is certainly a tenable one in circumstances where the courts have not previously given an authoritative view of the section.'[54]

105. It is submitted that if this Court had concluded in *Behan* that the actions of the Detective Superintendent had been conscious or reckless, a different approach to admissibility would surely have been taken, and irrespective of whether a search warrant could have been lawfully granted by a different Superintendent.

In the context of the *JC* exclusionary rule, it is not possible to balance rights in the manner suggested by the Court of Appeal

106. The ***fourth*** aspect of the reasoning of the lower courts which the Commission finds concerning relates to the balancing of rights required in the context of admissibility of evidence.

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107. The *JC* test is itself already the product of a balancing of rights. The reason why this Court departed from its previous decision in *Kenny*,[55] was that the *Kenny* test had disproportionate consequences for the community and for victims of crime, to the extent that its application was liable to bring the administration of justice into disrepute. It was for this reason that the Court recalibrated the test to allow for a more proportionate balance. O'Donnell J said:[56]

'As many courts have recognised, where cogent and compelling evidence of guilt is found but not admitted on the basis of trivial technical breach, the administration of justice far from being served, may be brought into disrepute. The question is at what point does the trial fall short of a trial in

[54] Ibid, §§71—76.
[55] *People (Director of Public Prosecutions) v Kenny* [1990] 2 I.R. 110.
[56] Judgment of O'Donnell J, §97.

due course of law because of the manner in which evidence has been obtained? When does the admission of that evidence itself bring the administration of justice in to disrepute? This analysis leads inevitably to a more nuanced position which would admit evidence by reason of a technical and excusable breach, but would exclude it where it was obtained as a result of a deliberate breach of the Constitution. The challenge is to identify some dividing line between these two extremes and which gives clear guidance to courts faced with more difficult questions.'

108. As is clear from the above analysis, the goal was to find a *'dividing line'* which would give *'clear guidance'*. This dividing line was identified. Both Clarke CJ and O'Donnell J made it clear that once evidence was found to have been obtained either consciously or recklessly in breach of rights, it must be excluded.

109. There can be no question that once a conscious or reckless breach of rights is established, the evidence could be admitted anyway because the evidence is very probative, or the offence very serious, or the impact on the rights of the community more serious than the impact on the rights of the accused. In this respect, O'Donnell J questioned[57] the existing exception recognised in *Shaw*,[58] that a court could admit such evidence where there were '*extraordinary excluding circumstances*' (such as questioning a suspect beyond their period of lawful detention, in order to save the life of missing victim).

110. The remedy that was provided in *JC*, to better protect the rights of the community and of victims, was not to permit a weighing by the trial court of those rights against the importance of the rights of the accused. Rather, this Court balanced the competing rights by relaxing the existing exclusionary rule, to permit admission of evidence that had been gathered as a result of an inadvertent breach of rights.

111. O'Donnell J based his conclusions, in part, on a detailed review of comparative caselaw including from the UK, US, Canada, New Zealand and South Africa. In

[57] Judgment of O'Donnell J, §34.
[58] [1982] I.R. 1.

those jurisdictions, while the chief consideration was whether the breach of rights was deliberate, there was scope to have regard to a broad range of circumstances in deciding whether unlawfully obtained evidence should be admitted. This Court could have adopted one of those tests. The *JC* test, however, is more focussed and is not discretionary.

112. Quite simply, the *JC* test represents an appropriate balancing of rights from which this Court should not depart.

CONCERNS REGARDING THE LOWER COURTS' FAILURE TO CONDUCT A PROPER *JC* ASSESSMENT

113. The Court of Appeal did, albeit to a very limited extent, address whether the breach of rights alleged by the Appellants could be described as conscious and deliberate.

114. Birmingham P commented that it was understandable that no new legislation had been enacted in the six months which had elapsed between the Judgment in *Tele 2*[59] and the criminal investigation in this case.[60]

115. However, in fact, the Gardaí continued to operate Sections 3 and 6 of the 2011 Act until December 2018, when the High Court pronounced judgment in *Dwyer v the Commissioner of An Garda Síochána & Others*.[61] The suggestion that the State's failure to remedy the situation so shortly after *Tele 2* was understandable, does not appear to reflect the reality of the State's approach.

116. The Special Criminal Court and Court of Appeal relied on the fact that the 2011 Act would have retained the presumption of constitutionality, in the eyes of the Gardaí operating it.[62] This is so, but the presumption must have limits in the context of the *JC* test.

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[59] Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson & ors* EU:C:2016:970.
[60] [2022] IECA 192, §26.
[61] [2019] 1 ILRM 523.
[62] [2022] IECA 192, §26.

117. A recent legal ruling on the admissibility of phone data evidence, from the Central Criminal Court case of *DPP v Gerard Cervi*,[63] is informative and demonstrates the proper approach to assessing admissibility, in respect of phone data evidence gathered pursuant to the 2011 Act.

118. The *Cervi* case is part-heard, and it would appear that legal rulings made by the trial Judge are under appeal. Nonetheless, the ruling demonstrates that if a *JC* test had been properly applied in the Appellants' cases, there would have been questions to answer.

119. In the course of a *voir dire*[64], the trial judge in *Cervi*, Murphy J, directed disclosure to the defence of correspondence between An Garda Síochána and the Department of Justice in the aftermath of the *Tele 2* case.

120. Internal Garda correspondence on the day of the *Tele 2* Judgment, 16 December 2016, stated that the *'the office of Assistant Commissioner Security and Intelligence is of the view that this judgment may have immediate implications for the current legal regime'*.[65]

121. On 16 January 2017, this view was reiterated by the legal section within An Garda Síochána: they expressed the view that the current retention and access regime was *'precluded under the 2002 Directive and the Charter of Fundamental Rights'*.[66]

122. Thereafter, the Commissioner of An Garda Síochána wrote to the Department of Justice on 10 March 2017 that:

> *'It is the view of An Garda Síochána that the Communication (Retention of Data) Act 2011 would fall foul of European Union law based on the judgment*'.[67]

[63] CCDP 0028/2019.
[64] *Cervi*, trial transcript, 12/12/22, p.5, line 30 onwards.
[65] p.31, line 8.
[66] p.31, line 26.
[67] p.32, line 8.

123. In a response dated 31 July 2017, the Department of Justice confirmed that *'it is clear that our law in this area, the Communication (Retention of Data) Act 2011, will need to be revised in order to ensure that it meets the new requirements set out by the court'.*[68]

124. Murphy J noted that in April 2017, Mr Justice Murray's report was furnished to the relevant State authorities. It stated that indiscriminate retention of data for the purposes of investigating serious crime was contrary to EU law, as was access to such data granted otherwise than by an independent authority.

125. Having regard to the foregoing evidence, Murphy J held as follows:[69]

> *'On the evidence, it is clear that the Irish authorities, the Department of Justice and Equality, and An Garda Síochána were aware in early 2017 that the 2011 Act and in particular, section 3 and 6 thereof were precluded, contravened EU law and were precluded by EU law. The gardaí were aware immediately that it had immediate implications for the continued use of the 2011 Act. Being so aware, they were under an obligation to disapply it. Notwithstanding their knowledge that sections 3 and 6 in particular, were precluded by EU law, they continued to use those provisions until December 2018.*
>
> *The Court is also satisfied that the State was aware that the relevant sections were precluded by EU law, having regard to the statements to that effect in the Murray Report, its correspondence with An Garda Síochána and the provisions of the General Scheme of the Communications (Retention of Data) Bill 2017 introduced in October 2017. Having regard to the state of knowledge of garda management, including the Security and Intelligence unit and the knowledge of the State, the Court finds that the continued use of the unlawful sections, particularly in the relevant period being June to September 2018 was a conscious and deliberate breach of the accused rights*

[68] p.35, line 6.
[69] p.61, line 9.

pursuant to Article 7 and 8 of the Charter of Fundamental Rights of the European Union.

On the issue of subsequent legal developments, the Court holds that the material legal development in this case was the 2016 decision of the CJEU in Tele2 and Watson, and not the decision of the Supreme Court in GD v. Commissioner of An Garda Síochána & Others in April 2022. In the course of his submissions, counsel for the DPP somewhat rhetorically asked, what were the guards to do, they were damned if they did and damned if they didn't? The Court has considerable sympathy for the quandary in which An Garda Síochána found themselves. Having immediately identified that the 2011 Act and, in particular sections 3 retention and 6, access, were precluded by EU law as declared in Tele2 and Watson, they immediately sought urgent legislation to remedy the problem.

Access to telephone data is a very significant tool in the investigative locker of An Garda Síochána. And the loss of that tool is a serious impediment to their investigations. However, the answer to the question, what were the gardaí to do is that they were to uphold the law as they knew it to be and cease use of the unlawful provisions until the law conformed with the requirements of EU law as set out in Tele2 and Watson.

The primary duty of An Garda Síochána is to uphold the law and that duty subsists, even when it is grossly inconvenient to garda investigations to do so. Might I also observe at this point that An Garda Síochána were failed by the State in its failure to enact legislation which they requested as a priority. In these circumstances, the Court holds that the prosecution has not established the admissibility of this evidence, in particular it has not discharged the onus on it to show that the breach of the accused Charter rights was inadvertent or was due to subsequent legal developments.

… The authorities took a calculated decision to continue using sections 3 and 6 of the 2011 Act, even though they knew they would be infringing Charter rights by so doing. The Court therefore holds that the prosecution

has not discharged the onus on it to prove to the unlawfully gathered evidence is admissible pursuant to the JC test.'

126. The Commission notes that there was no such comparable evidence before the Special Criminal Court in the Appellants' cases. There was no possibility of such evidence being adduced, however, since the trial Court did not accept that *JC* applied.

127. However, as noted, a *JC* assessment would undoubtedly have raised serious questions for consideration.

THE RATIONALE OF *JC* IS ENGAGED IN THE CIRCUMSTANCES HERE

128. Finally, it important to note that, based on the evidence heard in the Appellants' trials, it would appear that the Gardaí were making 100 to 150 access requests per week to telecommunications operators.[70]

129. If it transpired, in a *JC* hearing, that this unlawful regime of access had continued in conscious or reckless disregard of rights protected under the Charter, that would raise a significant issue.

130. Where such significant concerns arise in the context of an admissibility decision, they engage a core rationale of the exclusionary rule: upholding the integrity of the administration of justice and insulating the judicial arm of government from the taint of unlawful acts committed by the executive.

131. The duty to uphold the integrity of the administration of justice was at the heart of the decision of this Court in *JC* to modify the exclusionary rules proposed in both *Kenny* and *O'Brien*:[71] a rule which excluded evidence based on trivial breaches would bring the administration of justice into disrepute; whereas too readily admitting evidence gathered unlawfully, as opposed to unconstitutionally, could also bring the administration of justice into disrepute.

[70] Evidence of Retired Ch/Supt Thomas Maguire, trial transcript of 20th October 2020, p.68, line 30.
[71] *The People (Attorney General) v O'Brien* [1965] I.R. 142.

132. This rationale has been further developed in decisions of this Court, *post JC.* In the case of *C.A.B. v Murphy*,[72] O'Malley J said as follows:

> '*[125] … it seems clear that the exclusionary rule is not a free-standing rule that evolved or exists purely for the benefit of defendants in either criminal or civil proceedings. While it originated in the context of a criminal trial (The People (Attorney General) v. O'Brien [1965] I.R. 142) its broader purpose is to protect important constitutional rights and values. It will have been seen that, at different times and dealing with different issues, individual judges have laid greater or lesser emphasis on particular aspects of those rights and values. However the common themes are the integrity of the administration of justice, the need to encourage agents of the State to comply with the law or deter them from breaking it, and the constitutional obligation to protect and vindicate the rights of individuals. These are all concepts of high constitutional importance. Each of them, or a combination thereof, has been seen as sufficient to ground a principle that is capable of denying to the State or its agents the benefit of a violation of rights carried out in the course of the exercise of a coercive legal power.'*

133. In *DPP v Hannaway*,[73] O'Malley J suggested that the protection of the *exclusionary* rule might also extend to evidence which had been lawfully gathered, but which was unlawfully retained thereafter:

> *'… is the breach of such a nature that it could warrant the exclusion of otherwise lawfully admissible evidence? The answer to this question would depend in part on the seriousness of the violation – does it involve a breach of constitutional rights, a serious breach of a statutory provision, or just a technical illegality? – but must also depend on the extent to which the court might feel that its own process and the integrity of the administration would require such a course to be taken*.'

[72] [2018] 3 I.R. 640, §125.
[73] [2021] IESC 31, §130.

134. Accordingly, the exclusion of evidence is not only necessitated where there is a breach of some constitutional or legal right of the accused person. An overarching consideration is whether the integrity of the administration of justice requires its exclusion.

135. An analysis of how this principle should be applied can be found in the Supreme Court of Canada case of *R v Grant.*[74] In Canadian law, the exclusionary rule provided for under the Charter:

> *'requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.'*

136. Evidence that has been gathered in a manner that involves breaches of privacy may engage such a protective principle. And, if the breach was the result of a persistent, advertent disregard of a law protecting privacy rights, there would be a compelling basis to exclude such evidence.

CONCLUSION

137. In all the circumstances, the Commission submits that the *JC* test ought to have been applied here.

Mark Lynam BL

Catherine Donnelly SC

12 April 2023

[9,725 words]

[74] Op. Cit, §72.