



THE COURT OF APPEAL

Neutral Citation Number: [2022] IECA 98

Court of Appeal Record Number: 2021/18

**Murray J.
Costello J.
Donnelly J.**

BETWEEN

EMMETT CORCORAN AND ONCOR VENTURES LIMITED T/A THE DEMOCRAT

**APPLICANTS/
RESPONDENTS**

- AND -

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND DIRECTOR OF PUBLIC
PROSECUTIONS**

**RESPONDENTS/
APPELLANTS**

JUDGMENT of Ms. Justice Costello delivered on the 22nd day of April 2022

1. This appeal concerns the balance between the obligations of An Garda Síochána to investigate serious crime on the one hand and the right of a journalist to protect his sources from disclosure on the other. On 4 February 2021, the High Court (Simons J.) crafted a bespoke Order delimiting the information on the mobile phone of the first named applicant, Mr. Corcoran, which the gardaí could access following the seizure of the phone on foot of a warrant issued by a District Court Judge to a member of An Garda Síochána. Both parties claim that the trial judge erred in making this order, and at the heart of this appeal is the balancing of the conflicting rights and duties of the parties: the entitlement or otherwise of An Garda Síochána to access material while investigating serious crime but which will or may identify journalistic sources of the applicants.

Background

2. In 2018, Mr. Corcoran and Mr. Phelim O'Neill, a solicitor, incorporated the second named applicant ("the publisher") to publish a local weekly newspaper, known as the Democrat, in Longford, Leitrim and Roscommon. By December 2018, sixteen or seventeen editions had been published with a weekly circulation of between 5 and 6,000. Mr. Corcoran is the editor of the Democrat and he is a journalist who has been published in the Irish Times. The Democrat also has an online presence. Mr. Corcoran resides in Strokestown, County Roscommon.

3. On 11 December 2018, a property at Falsk, Stokestown was repossessed pursuant to a court order for possession and security personnel acting on behalf of the charge holder went into occupation of the property. On 16 December 2018, at approximately 5 a.m. a violent and serious incident occurred in which a number of masked and armed people attended at the premises, attacked and injured the security personnel and set a number of vehicles alight. Mr. Corcoran says he attended at the aftermath of the incident and took photos and videos which he uploaded on the website of the publisher and which were viewed and reproduced many times.
4. On 19 December 2018, Mr. Corcoran was interviewed under caution by members of An Garda Síochána investigating the incident of 16 December 2018. He was accompanied by Mr. O'Neill who was solicitor for both of the applicants. Mr. Corcoran offered to make available all copies of videos and photos which he took on the occasion and he did so on the following day. He declined to reveal his sources and in particular the individual who alerted him to the event, asserting "*journalistic privilege*".
5. The gardaí continued their investigation into this extremely serious incident. Three and a half months later, on 2 April 2018, Sergeant Siggins applied *ex parte* in chambers to a District Court judge in Roscommon for two search warrants: one in respect of Mr. Corcoran's home and one in respect of the publisher's premises. The application was made pursuant to s. 10 of the Criminal Procedure (Miscellaneous Provisions) Act 1997 ("the 1997 Act"). The provisions of the Act will be considered in greater detail below. At present, it is sufficient to state that if a judge of the District Court is satisfied by information on oath of a member of An Garda Síochána not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the search of that place and of any persons found at that place.
6. Sergeant Siggins swore an information in the following terms:-

"THE INFORMATION of Sergeant Dermot Siggins of Castlerea Garda

Síochána Station.

Who says on oath:-

I am a member of the Garda Síochána not below the rank of sergeant.

I have reasonable grounds for suspecting that – evidence of, or relating to, the commission of an arrestable offence (within the meaning of section 2(1) of the Criminal Law Act 1997, as amended by section 8 of the Criminal Justice Act 2006), False Imprisonment, unlawful possession of a firearm, assault causing harm, criminal damage, is to be found at a place (within the meaning of section 10(6) of the Criminal Justice (Miscellaneous Provisions) Act 1997), namely [], Strokestown, the home of Emmet Corcoran in the said Strokestown, District Court Area No. 4 district.

The basis for such grounds is as follows –

In the early hours of the 16th December 2018 at Falsk, Strokestown, a group of approximately 30 men attacked a group of 8 security men with weapons and a firearm inflicting injuries on three of the security men. The immediate aftermath of the attack was recorded on a device which was handed over voluntarily by Emmet Corcoran to Sergeant Dermot Siggins at Roscommon Garda station on 20th December 2018. [NAME REDACTED] one of the injured parties alleges that when he was on the ground just after the attack a Peugeot vehicle pulled up, a male wearing square shape glasses, heavy set, approx. 5' 8", blue jeans, tan/brown dealer boots, was recording on his mobile phone, he was accompanied by a man in a balaclava who was wearing a camouflage jacket with DPM on it. He was in possession of a wood cudgel with a knotted head on. This video was recorded prior to the emergency services arriving. As the emergency services lights were seen the man in the balaclava told the other male that it was time to go. A video of the immediate aftermath of the incident was then posted online on Facebook page Democrat and also on Democrat.ie. These sites are co-owned by Emmet Corcoran and Phelim O'Neill. The description of the male given by the injured party matches the description of Emmet Corcoran who was present with the person with the balaclava at the scene. Furthermore the USB Hardrive (sic) handed over by Mr Corcoran was examined by the Computer Crime Cyber Unit which indicates this footage was downloaded from an iphone 6 between the hours of 5:34hrs – 5:40hrs on the 16th December 2018. The article in both sites contains information that was not in the public domain unless the person who posted it was present at the scene. I believe from investigations carried out there are reasonable grounds to believe Emmet Corcoran was present at the attack and I believe an iphone 6 and further video footage which may identify other suspects sought in the investigation may be found on an iphone 6 or other computer or media device at Democrat.ie Newspaper, [address redacted], Strokestown, Co Roscommon and the home of Emmet Corcoran at [address redacted], Strokestown, Co. Roscommon.

And I hereby apply for the issue of a warrant under section 10(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as substituted by section 6(1)(a) of the Criminal Justice Act 2006) in respect of that place and any persons found at that place."

7. An information, in virtually identical terms, was sworn in respect of the premises of the publisher in support of the application to search its premises. The information does not state that Mr. Corcoran is a journalist and the Democrat is a local newspaper, though it is evident from the content of the information that both are the case. Sergeant Siggins did not refer to the fact that Mr. Corcoran had refused to identify his sources during an interview under caution and that he had asserted journalistic privilege. While Sergeant Siggins swore two affidavits in these proceedings, there is no evidence that the District Court judge was told that the applicants' rights under the Constitution and Article 10 of the European Convention on Human Rights were engaged by the application, or that he

was given any guidance as to the jurisprudence applicable in such circumstances, or the threshold which must be satisfied before those rights could be interfered with by the issuing of the warrant sought.

8. Sergeant Siggins attended early on the morning of 4 April 2019 at Mr. Corcoran's home. He indicated to Mr. Corcoran that he intended to seize Mr. Corcoran's mobile phone on foot of the warrant issued by the District Court judge. When Mr. Corcoran protested, he indicated that it was a criminal offence to obstruct him in executing the warrant. As a result, under protest, Mr. Corcoran handed over his phone. The phone was powered off and Mr. Corcoran refused to inform Sergeant Siggins of the password which would enable the content of the device to be accessed immediately.
9. Before members of An Garda Síochána could access the data on the phone the applicants applied to the High Court that afternoon for leave to seek Judicial Review.

The Proceedings

10. On 4 April 2019, the High Court (Noonan J.) granted the applicants leave to apply for judicial review for the reliefs set forth in the statement of grounds and made an order restraining the first named respondent and any member of An Garda Síochána or any person with knowledge of the order from examining or otherwise attempting to access information on the phone, the subject matter of the proceedings, to the following day at 10:45 a.m.
11. In the statement of grounds, the applicants describe themselves respectively as a newspaper editor and newspaper publisher. The applicant sought an order of *certiorari* in respect of the warrant and an order of *mandamus* requiring the respondents to deliver over to the applicants all and any information and data accessed on the phone together with the deletion of any copies retained by the respondents, and an order prohibiting the second named respondent from accessing, processing or relying on any data or information obtained from the phone.
12. On 5 April 2019, counsel for the first named respondent ("the Commissioner") undertook to the court that neither he nor any member of An Garda Síochána would examine or otherwise attempt to access information on the phone, the subject matter of the proceedings, pending further order. The second named respondent took no part in the proceedings.
13. By letter dated 10 May 2019, the Chief State Solicitor acting on behalf of the Commissioner offered to compromise the proceedings on the basis that Garda Telecoms personnel would download/extract all the information contained on the phone which would be stored on a secure, encrypted external hard drive and that those personnel would copy certain parts of the information into a separate document to wit: -

"4. ...

- (i) *The telephone calls to and from the phone for the period of the 11th-17th December, 2018 inclusive;*

- (ii) *The emails and text message, including other social media messaging services such as Whatsapp, Facebook, Messenger etc. sent from and received to the phone for the period of the 11th -17th December, 2018 inclusive;*
- (iii) *The images contained on the memory of the phone which were either captured, uploaded or placed onto the phone in the period of the 11th – 17th December, 2018 inclusive;*
- (iv) *The videos which were recorded, uploaded or otherwise placed on the phone in the period of the 11th – 17th December, 2018 inclusive;*
- (v) *Other information contained in the phone which was uploaded to it in the period of the 11th – 17th December, 2018 inclusive.*

All the foregoing is predicated on the fact that the phone is appropriately date and time stamped so that it is possible to see the information contained on it is from the 11th – 17th December, 2018 and that the data can be acquired and decoded using a standard forensic techniques.

...

The period of the 11th – 17th December 2018 is reasonable and proportionate to the public interest in the investigation and prosecution of criminal offences relating to the events at Falsk, Strokestown, Co. Roscommon on the 16th December, 2018.

5. *The contacts (including email addresses) or saved named (sic) for contacts on the telephone for the calls and messaging data (telephone calls, text messages and social media platform messaging) during the period of the 11th – 17th December, 2018 inclusive would also be extracted and placed on the document with the other material referred to above.”*

The Commissioner asserted that this was a reasonable and proportionate response to the issues raised in the proceedings. However, the letter went on to state that:-

“... the proposal is made without prejudice to the entitlement of An Garda Síochána to seek to extract further information from the phone for appropriate investigative purposes relating to the on-going investigations being carried out into events in Falsk, Strokestown, Co. Roscommon and other inquiries arising out of that investigation.

If any such further information was to be sought from the phone, appropriate notification would be provided to Mr. Corcoran so that he may make a submission to the Garda Commissioner ...”.

14. The statement of opposition was filed on 21 June 2019. The Commissioner pleaded, *inter alia*, that the matters did not give rise to any justiciable issue that the contents of the phone are subject to any privilege known to law. The Commissioner denied that any

"journalistic privilege" known to law existed over the phone and without prejudice to this position he said that the procedure proposed in his letter of 10 May 2019 adequately protected the interests of the applicants (if any) in the contents of the phone.

15. The applicants, through their solicitors, replied to the offer of 10 May 2019 by a letter dated 13 August 2019. They said that they never had any difficulty with providing the videos and photographs taken at the scene and agreed to the matters set out in para. 4 (iii) and (iv). They objected to disclosure of a journalist's sources and thus to the balance of the matter sought in paras. 4 and 5 of the letter of 10 May. They particularly objected to the fact that the proposal was made without prejudice to the entitlement of An Garda Síochána to seek to extract further information from the phone for *"appropriate investigative purposes relating to the on-going investigation"* and other enquiries arising out of that investigation.
16. There were exchanges of affidavits between the parties and written submissions and supplemental written submissions at the direction of the court. The matter was heard over three days in July 2020 and judgment was delivered on 11 September 2020.

The Decision of the High Court

17. The High Court held that the gravamen of the applicants' case is that the Oireachtas has failed to enact legislation which prescribes an appropriate procedure whereby court authorisation is required prior to the issuance of a search warrant in respect of premises or property belonging to a journalist. They submit, by reference to case law of the European Court of Human Rights, that a procedure must be prescribed by law whereby a court can determine, prior to issuing a search warrant, whether there exists a public interest which overrides the principle of protection of journalistic sources. They argue that it is impermissible for An Garda Síochána to invoke the conventional search warrant procedure in s. 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 in any case where there is a *prima facie* claim of journalistic privilege. This is because the existing statutory procedure does not allow for the possibility of the consideration of a claim of journalistic privilege prior to the issuance of a search warrant.
18. The court identified the issues thus arising as follows:-

"8. ... First, the nature and extent of the right engaged under the Constitution must be examined. Whereas the case law recognises that, in certain circumstances, a journalist may be entitled—as a corollary of the right of freedom of expression—to withhold details of his or her confidential sources, the precise range of circumstances are not yet fully defined. Secondly, the meaning and effect of section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as substituted) must be considered. Thirdly, the legality of the search and seizure must then be ruled upon. Fourthly, if the search and seizure is found to be unlawful, the consequences which flow from that finding must be considered. Finally, in the event that the proceedings cannot be resolved by reference to the constitutional law issues, it will then become necessary to consider the implications, if any, of the European Convention on Human Rights Act 2003."

19. The High Court considered the guarantee of freedom of expression under the Constitution (at paras. 32 to 59). At para. 60, Simons J. summarised the principles established by the caselaw as follows:-

- "(i). The Constitution protects not only the right of the citizens to express freely their convictions and opinions, but also the right of organs of public opinion—such as the radio, the press, the cinema—to liberty of expression.*
- (ii). These rights are not absolute or inviolable, and may be overridden by a court by reference to some general balancing test based on the public interest.*
- (iii). It follows as a corollary of these express rights that a journalist may, in certain circumstances, have an implied or derived right to protect the identity of their confidential sources. This right is seen as necessary to allow journalists to investigate and report on matters of public interest. A person might only be prepared to engage with a journalist if their identity as a source is protected. For example, an employee who wishes to report wrongdoing by their employer may be fearful of reprisals if they were to be identified as the source of a story.*
- (iv). The right to protect a source is not absolute or inviolable. The judgment in Re O'Kelly (1974) 108 I.L.T.R. 97 suggests that this right may well be outweighed by the obligation of all citizens, including journalists, to give relevant testimony with respect to criminal conduct. Whereas the more recent judgments have attached greater importance to the protection of journalistic sources, the special position of criminal proceedings has nevertheless been adverted to in those judgments.*
- (v). The balancing exercise must be carried out by a court of law. It is not enough that a journalist simply asserts privilege: the claim must be adjudicated upon by a court. A journalist is not entitled to pre-empt such an adjudication, by deciding unilaterally to destroy documents deliberately in response to a request for disclosure.*
- (vi). In all of the case law discussed above, the question of journalistic privilege had come before the court by way of a specific procedural mechanism, e.g. an application to enforce the orders of a tribunal of inquiry, an application for the discovery of documents in civil proceedings, or an application for letters rogatory. As discussed presently, one of the principal disputes between the parties in the within proceedings concerns the identification of the procedural mechanism by which, and the forum before which, the Applicants' claim for journalistic privilege is to be determined. Both sides are now agreed that it does not fall for determination by the District Court in the context of an application to issue a search warrant.*
- (vii). The case law has not addressed the issuing and execution of a search warrant against a journalist. In particular, the courts have not yet had to consider the chilling effect which such actions may have on a journalist (even in instances where*

no material is discovered). This has, however, been addressed in detail in the case law of the ECtHR."

20. The trial judge then considered the interpretation of s. 10 of the 1997 Act and held as follows:-

"76. ... The District Court is required to be satisfied that there are "reasonable grounds" for suspecting that evidence of, or relating to, the commission of an arrestable offence (as defined) is to be found in the place in respect of which the warrant is sought. The Oireachtas has determined that the potential interference with the property and privacy rights of a person affected by a search warrant is justified by the public interest in the investigation and prosecution of serious criminal offences provided that this "reasonable grounds" criteria is met. The legislation does not expressly address other rights which may be affected by the execution of a search warrant. No provision is made, for example, for the contingency of seized material being protected by legal professional privilege. In practice, An Garda Síochána would, presumably, adopt the pragmatic approach of not examining any material in respect of which legal professional privilege is claimed, pending an adjudication by a court on such a claim.

77. The section does not, in terms, make any reference to a distinction between participants and non-participants in the alleged criminal offence, still less does it make any reference to the position of a journalist. On its face, therefore, there is nothing in the section which requires either the police authorities who are seeking the warrant, or the District Court, to consider the position of a journalist or the need to protect journalistic sources."

21. He emphasised that both parties agreed that they do not contend for an interpretation of the section which would require the District Court to carry out a balancing of rights for the purpose of Article 40.6.1.i of the Constitution. He noted that the application is to be made *ex parte*, in camera, and that the section excludes the possibility of an *inter partes* hearing. He therefore concluded that no balancing exercise of the type contended for by the applicant can be carried out in the context of an application for a search warrant under the section. He held that the District Court did not have jurisdiction on a warrant application to determine any issue in respect of journalistic privilege.
22. The applicants refined their position during the hearing in the High Court. They argued that the procedure under s. 10 did not allow for the possibility of a consideration of a claim of journalistic privilege and, accordingly, that it was impermissible for An Garda Síochána to invoke the procedure in any case where there is a *prima facie* claim of journalistic privilege. At para. 90, the trial judge held:-

"90. The applicants' case is predicated on an assumption that, in the circumstances outlined in Mr. Corcoran's affidavits, they are entitled to rely on journalistic privilege to resist disclosing the content of the mobile telephones. The applicants' criticisms of the procedures adopted by an Garda Síochána all flow from that

assumption. For the reasons which follow, I have concluded that that assumption is not well founded, and that there is no right to rely on a claim of journalistic privilege in this case.

...

92. The height of the applicants' case is that the identity of the individual who had been the source of the "tip-off", which led to Mr. Corcoran attending at the aftermath of a criminal incident, should be protected. Perhaps tellingly, Mr. Corcoran has provided no information whatsoever as to the circumstances in which this individual approached him. In particular, there has been no attempt to explain what the motivation of the source may have been or what public interest he or she sought to advance by the publication of the criminal incident."

23. The trial judge from there carried out a balancing exercise between the public interest in the investigation and prosecution of criminal offences and the public interest in the protection of journalistic sources at paras. 93 to 102 of his judgment. At para. 96, he held that the criminal conduct (which he described as arising out of a serious assault and the destruction of property) is extraneous to and separate from the disclosure or publication. He was satisfied that the public interest in ensuring that all relevant evidence is available in the pending criminal proceedings overrides the claim for journalistic privilege in the case. At para. 98 he held:-

"Thirdly, the nature and extent of the examination of the mobile telephone proposed by An Garda Síochána is proportionate in that it is confined to a very short period of time. The detail of the proposed examination has been set out in the letter from An Garda Síochána summarised at paragraph 26 above."

The trial judge made no express reference to journalistic contacts as opposed to the seeking out and preservation of evidence, in particular the video footage and digital photographs taken by Mr. Corcoran. On the other hand, at para. 102, he said that he had regard to the fact that the evidence did not establish that the journalist's source was motivated by the desire to provide information which the public was entitled to know and he cited a decision of the European Court of Human Rights ("ECtHR") in *Stichting Ostade Blade* (App. No. 8406/06) where the court held that "source protection" was not in issue where the information was submitted to a journalist by the perpetrator of a criminal offence.

24. The trial judge considered the arguments of the applicants based on the European Convention on Human Rights ("ECHR" or "the Convention"). He noted that the applicants had not sought a declaration of incompatibility pursuant to s. 5 of the European Convention on Human Rights Act 2003 ("the 2003 Act") in respect of s. 10 of the Act of 1997. Having observed that the Convention is not directly applicable in domestic law, he noted that it was possible to rely on the Convention indirectly pursuant to the 2003 Act. Initially, the applicants had sought to rely on the interpretative obligation under s. 2 of the 2003 Act but this was no longer possible given the consensus between the parties

that s. 10 of the 1997 Act could not be interpreted so as to allow for an inter partes hearing. Instead, the applicants sought to rely on s. 3 of the 2003 Act. This provides:-

"3.(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its role in a manner compatible with the State's obligations under the Convention provisions."

25. Simons J. concluded at paras. 116 and 129 that:-

"... The applicants are not entitled to assert journalistic privilege under the European Convention in respect of the content of the mobile telephone. The same rationale applies to the right under the European Convention as to the Constitutional rights. In the absence of any breach of the European Convention, an Garda Síochána acted lawfully in invoking the procedure under s.10 of the Act of 1997 in the particular circumstances of the case.

...

129. The examination of the content of the mobile telephone is to be limited to the following items.

- (i) The telephone calls to and from the phone for the period of the 11th – 17th December, 2018 inclusive;*
- (ii) The emails and text messages, including other social media messaging services such as Whatsapp, Facebook Messenger etc., sent from and received to the phone for the period of the 11th – 17th December, 2018 inclusive;*
- (iii) The images contained on the memory of the phone which were either captured, uploaded or placed onto the phone in the period of the 11th – 17th December, 2018 inclusive;*
- (iv) The videos which were recorded, uploaded or otherwise placed on the phone in the period of the 11th – 17th December, 2018 inclusive;*
- (v) Other information contained in the phone which was uploaded to it in the period of the 11th – 17th December, 2018 inclusive."*

He directed the parties to make further submissions as to the form of the order and the costs of the application.

The Second Judgment

26. Having decided that he would make a limited order permitting the Commissioner to access the content of the mobile phone, Simons J. delivered a supplemental judgment on 4 January 2021 dealing with the form of order, the costs of the proceedings and the issue of a stay on the order. At paras. 3 and 4 of the supplemental judgment he held:-

"3. The form of order proposed in the principal judgment had been a declaration to the effect that the examination of the content of the journalist's mobile telephone is to be limited to specified content created during the period 11th – 17th December 2018 (both dates inclusive). However, it now appears from the written submissions filed on behalf of An Garda Síochána that the actual logistics of accessing the content of a mobile telephone are more complex than I had appreciated. In particular, it seems that it is not technically possible to download part only of the content of a mobile telephone. Instead, it will be necessary to download and decode the full file system. A separate report will then be prepared identifying the relevant content over the period 11th – 17th December 2018.

4. For the avoidance of any doubt, the report is not to include contact details (such as names, telephone numbers, email addresses etc.) saved on the mobile telephone." (emphasis in original)

He decided to make an order restraining members of an Garda Síochána from accessing and examining the content of the mobile telephone other than in accordance with the procedure he set out, granted both parties liberty to apply and stayed his order pending any appeal.

27. As regards the allocation of costs, he ordered the Garda Síochána to pay the applicants the costs of the proceedings in the following terms:-

"28. ... I have concluded that the applicants acted reasonably in continuing to pursue the proceedings notwithstanding the offer of settlement. Had the applicants accepted the terms of settlement, they would have been in a worse-off position than they are now, having pursued the proceedings to full hearing. The terms of the court's order are more restrictive than the terms of settlement, which had expressly left over the possibility of extracting further information from the mobile telephone. Insofar as costs were concerned, the applicants were, at the very least, entitled to the costs of the leave application given the precipitous manner in which the device was seized. Given that the offer of settlement did not undertake to pay even these costs, the applicants acted reasonably in rejecting same.

29. *More generally, it was reasonable for the applicants to pursue the proceedings in circumstances where An Garda Síochána's position was that any balancing of the competing public interests engaged in the seizure of a journalist's mobile telephone was a matter for the High Court rather than the District Court."*

Proceedings leading up to the appeal

28. Following the delivery of the judgment of 4 January 2021, the Commissioner understood for the first time that An Garda Síochána were not entitled to access the contacts on the mobile phone. The Commissioner decided to apply to the trial judge pursuant to the order granting the parties liberty to apply, in order to clarify this point. The Commissioner had understood from para. 129 of the principal judgment that he was to have access to the contacts on the mobile phone. He also decided to appeal the order as

to costs and he filed a notice of appeal on 2 February 2021 which was confined to the issue of costs.

29. On 12 February 2021, the Commissioner applied to the High Court to re-enter the matter to “ventilate” the “contacts” issue. On 9 March 2021, the matter was listed for mention in the High Court. The applicants indicated that they wished to cross-appeal the substantive decision and they would also be applying for a “leapfrog” appeal to the Supreme Court. The High Court put the matter back for mention to 25 March 2021.
30. At the first Directions hearing in the Court of Appeal on 19 March 2021, the matter was adjourned to 16 April 2021 to allow the applicants to file their respondents’ notice and cross-appeal. On 25 March 2021, the High Court adjourned the matter again for mention to 6 May 2021.
31. On 15 April 2021, the respondents’ notice and cross-appeal was delivered. This greatly expanded the scope of the appeal – as the respondents had indicated would be the case. On 16 April 2021, the matter was adjourned to the following week in the Directions List to allow the Commissioner to consider the respondents’ notice. The Commissioner decided to serve a respondents’ notice to the respondents’ (the applicants’) cross-appeal. Strictly speaking, no such provision exists under the RSC but it was deemed expedient in view of the fact that the cross-appeal had greatly expanded the scope of the appeal.
32. On 6 May 2021, the High Court adjourned the question of the disclosure of the contacts generally with liberty to re-enter to await the outcome of the proceedings before this court. The Supreme Court having then refused the application for a leapfrog appeal, on 10 May 2021, the Commissioner served a respondents’ notice to the appellants’ cross-appeal which in turn included a cross-appeal in respect of the exclusion of the contact details from the High Court order. The appeal was listed for hearing on 22 November 2021 for a day and a half.
33. On 30 July 2021, the appeal was mentioned in this court’s case management list, at which point the applicants objected to the Commissioner’s cross-appeal in respect of their cross-appeal. I directed that if the Commissioner wished to pursue an appeal in relation to the exclusion of the contacts from the data the gardaí were authorised to access, the Commissioner must bring an application seeking leave to amend his notice of appeal and any such motion was to be returnable for 8 October 2021. The application was not filed in accordance with this direction. On 15 October 2021, at the callover of the appeal, counsel for the Commissioner asked for an extension of time in which to bring the motion. This was strongly opposed by counsel for the applicants and I held that the issue whether the Commissioner could argue this point was to be determined by the court hearing the appeal.
34. Thus, the applicants appealed the substance of the order of the High Court and the Commissioner appealed the exclusion of all contact details from the data to be disclosed to An Garda Síochána and the award of costs in favour of the applicants. At the hearing of the appeal, the court concluded that it was important that all matters at issue between

the parties be fully argued and determined by the court and thus no party was prevented from advancing any argument arising out of the two judgments of the High Court, whatever the precise status of the pleadings in relation to the appeal might be.

Constitutional protection of freedom of expression and journalistic privilege

35. Article 40.6.1.i of the Constitution provides as follows:

"The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –

i The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of seditious or indecent matter is an offence which shall be punishable in accordance with law."

36. What is described in shorthand terms as "journalistic privilege" is a right of journalists in certain circumstances to refuse to disclose their sources. The precise nature of the "privilege" was explained by Hogan J. in *Cornec v. Morrice* [2012] IEHC 376, [2012] 1 I.R. 805 at para. 42:-

*"While I have thus far loosely spoken of a journalistic privilege, there is, in fact, **in strictness**, no such thing. The protection is rather the high value which the law places on the dissemination of information and public debate. Journalists are central to that entire process, a point expressly recognised by Article 40.6.1.i of the Constitution itself when it recognises "their rightful liberty of expression" on the part of the press, albeit counter-balanced by the stipulation that this rightful liberty shall not be used to undermine "public order or morality or the authority of the State."*

It is in this sense that journalistic privilege should be understood in this judgment.

37. The policy considerations underpinning journalistic privilege as thus understood were addressed in the decision of the High Court in *Mahon v. Keena* [2007] IEHC 348 at para. 30:-

"Going hand in hand with this, is the critical importance of a free press as an essential organ in a democratic society. An essential feature of the operation of a free press is the availability of sources of information. Without sources of information journalists will be unable to keep society informed on matters which are or should be of public interest. Thus there is a very great public interest in the

cultivation of and protection of journalistic sources of information as an essential feature of a free and effective press."

38. In *Mahon v. Keena*, the plaintiffs were the members of a tribunal of inquiry which was established to investigate irregularities in the planning process. The first named defendant was a journalist employed by the Irish Times and the second named defendant was the editor of the newspaper. The first named defendant received an anonymous and unsolicited confidential communication which had been sent to a witness by the tribunal seeking information as part of its private investigations. The contents of the letter were published by the Irish Times in an article written by the first named defendant. The members of the tribunal wished to investigate the leak of the confidential information to the Irish Times and served summonses on the defendants ordering them to attend before it and to produce all documents which comprise the communication received by the first named defendant and which had led to the publication of the article, and also to answer all questions to which the tribunal might require answers in relation to the source of the information. The defendants deliberately destroyed the copy of the document and, while they appeared before the tribunal, refused to answer any questions which might provide assistance in identifying the source of the anonymous communications. The plaintiffs instituted proceedings seeking, *inter alia*, orders compelling the defendants to attend before the tribunal and to answer questions relating to the source of the leaked document. A divisional court of the High Court granted the plaintiffs the relief sought pursuant to s. 4 of the Tribunal of Inquiries (Evidence) (Amendment) Act 1997.
39. The defendants appealed to the Supreme Court and argued that extraordinarily strong countervailing circumstances were required before a journalist could be obliged to disclose his or her sources and the High Court had erred in failing to afford sufficient weight to the journalist's privilege against disclosure. Fennelly J., giving the judgment of the court, said that the appeal turned entirely on the balance struck by the High Court between the power of the tribunal to investigate and the right of the defendants to refuse to disclose any information about their sources. He considered the European Convention on Human Rights Act 2003. He noted that the long title to the Act states that it was passed in order to give "*further effect subject to the Constitution to certain provisions*" of the Convention. At paras. 61-65 he held:

"[61] Section 2(1) of the Act of 2003 provides that:-

"In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

[62] Section 3(1) provides:-

"Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

[63] *The definition of an "organ of the State" in s. 1 includes "a tribunal ... which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised". The tribunal undoubtedly comes within that definition.*

[64] *Section 4 provides:-*

"Judicial notice shall be taken of the Convention provisions and of-

(a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,

(b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,

(c) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction,

and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments."

[65] *The combined effect of these provisions for the purposes of the present case is that the relevant sections of the tribunals of inquiry legislation must be interpreted in "a manner compatible with the State's obligations under the Convention provisions". For that purpose, the court must take judicial notice of the Convention provisions themselves and of the various documents mentioned in s. 4 of the Act of 2003. Foremost among those are the judgments of the European Court of Human Rights. The requirement that the court take judicial notice of the Convention and of the various documents referred to means that they can be relied upon by the court without special proof. The court must, in addition, as the concluding words of the provision make clear, "take due account" of the principles laid down in those judgments. This is not the same as saying that they constitute binding precedents."*

40. He then considered the provisions of Article 10 of the Convention, which are as follows:-

"1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation*

or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

41. He observed that the judgments of the ECtHR emphasise not merely the fundamental right to freedom of expression but, in the case of the press, its indispensable contribution to the functioning of a democratic society. But, while the ECtHR also acknowledged that the right to freedom of expression is not unlimited, Fennelly J. observed at para. 72 that *"nonetheless, the Court constantly emphasises the value of a free press as one of the essential foundations of a democratic society ... generally, therefore, restrictions on freedom of expression must be justified by an "over riding requirement in the public interest"."*
42. From para. 79 onwards, Fennelly J. considered the decision of the ECtHR in *Goodwin v. United Kingdom* (1996) 22 EHRR 123. That case concerned commercial information about a company of a highly confidential and secret character. It was claimed that disclosure would threaten the business and livelihood of its employees. The information was communicated to the journalist in question by a person who, though known to the journalist, wished to remain anonymous. The company secured an interim injunction restraining publication, having been alerted to the disclosure of the information prior to its publication when the journalist contacted the company making enquiries based on the leaked information. The English Courts made orders requiring the journalist to disclose his source and he refused to comply. The House of Lords fined him UK£5,000 for contempt of court. Fennelly J. quoted from the judgment of the ECtHR at p.143:-

"Protection of journalistic sources is one of the basic conditions of press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

Fennelly J. endorsed and applied these principles without differentiating between the protections afforded to journalists under the Constitution and under Article 10 of the ECHR.

43. At para. 80, Fennelly J. noted the ECtHR laid emphasis on the need for any restriction on freedom of expression to be *"convincingly established"*. It said that the *"national margin of appreciation is circumscribed by the interest of a democratic society in ensuring and maintaining a free press."* Therefore, *"limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court."*

44. He held that the court must balance the competing right of journalists to protect their sources with the right of the members of the tribunal under s. 4 of the Act to investigate the disclosure of confidential information. He held that the High Court was correct to hold that journalists cannot adjudicate on the proper balance to be struck between the rights and interests concerned and that it is a matter for the courts alone to decide when a journalist is obliged to disclose his or her sources: "*In the event of conflict, whether in a civil or criminal context, the Courts must adjudicate and decide, while allowing all due respect to the principle of journalistic privilege.*" (See para. 92)
45. In carrying out this balancing act, the Supreme Court was not concerned with whether the act of the journalists in destroying the documents in question was wrongful and deserving of opprobrium, but rather the narrower question of whether, in the circumstances where the documents no longer existed, there was a logical or causal link between that act and the order made. He held that the order "*now to be made*" had to be justified "*by the situation as it now exists.*" For this reason, he reversed.
46. The Supreme Court held that the High Court had devalued the journalistic privilege so severely that the balance between the plaintiffs and the defendants was not properly struck; insufficient weight was accorded to the rights of the journalists. On the other hand, Fennelly J. found it very difficult to discern any sufficiently clear benefit to the tribunal from any of the answers to the questions they wished to pose to justify the making of the order. He therefore concluded that the plaintiffs had not met the test established in *Goodwin* and the appeal was allowed.
47. The decision of the Supreme Court in *Mahon v. Keena* establishes that an order compelling journalists to answer questions for the purpose of identifying their source could only be justified by an overriding requirement in the public interest or a pressing social need for the imposition of a restriction or encroachment upon the right to freedom of expression. Limitations on the confidentiality of journalistic sources called for the most careful scrutiny by the court having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure on the exercise of that freedom.
48. In *Mahon v. Keena*, the Supreme Court did not consider the case of *In Re Kevin O'Kelly* [1974] 108 ILTR 97, a decision of the Court of Criminal Appeal. Mr. O'Kelly was a journalist who interviewed an individual who said that he was the chief of staff of the IRA. He intended to broadcast the interview. The interviewee was charged with being a member of a proscribed organisation and Mr. O'Kelly was called as a witness for the prosecution at the trial to identify the interviewee. In the course of his evidence, he refused to answer a question put to him on the basis that to do so would be to breach a confidence and to identify a source. The court found him in contempt and imposed a sentence of three months' imprisonment. He appealed against the severity of the sentence but not the conviction. Walsh J. delivered the judgment of the court. He considered the provisions of Article 40.6 of the Constitution and observed that it was

obvious that not every news gathering relationship from the journalist's point of view requires confidentiality. He then continued:-

"But even where it does journalists or reporters are not any more constitutionally or legally immune than other citizens from disclosing information received in confidence. The fact that a communication was made under terms of expressed confidence or implied confidence does not create a privilege against disclosure. So far as the administration of justice is concerned the public have a right to every man's evidence except for those persons protected by constitutional or other established and recognised privilege."

49. This passage was relied upon by the Commissioner in his submissions, but it is important to note that it was strictly speaking obiter dicta, as the appeal in that case was against sentence only and, accordingly, the question as to whether Mr. O'Kelly was entitled to refuse to answer the questions put to him was not an issue before the Court of Criminal Appeal. Furthermore, as Hogan J. observed in *Cornec*, a journalist could only possibly assert a right to protect his sources from disclosure where the identity of the person in the broadcast was itself confidential and withheld from listeners or viewers. The open identification of the interviewee as the chief of staff was itself an intrinsic part of the entire broadcast and therefore the argument based on journalistic privilege was misplaced to begin with. I agree with his observation and I find that the observations of Walsh J. are of little assistance in resolving the issues presenting in this appeal.
50. The importance of the constitutional protection afforded to journalistic privilege was emphasised in *Cornec* at para. 43 where Hogan J. held that:-

*"... the constitutional right in question would be meaningless if the law could not (or would not) protect **the general right of journalists to protect their sources**. This would be especially true of the particular example of that rightful liberty afforded by Article 40.6.1.i which is expressly enumerated therein – criticism of Government policy...-*

if no such protection were available."

51. He noted that the right was not absolute or inviolable and that where there were competing or conflicting interests and rights it was necessary to balance them. He characterised the public interest in ensuring that journalists can protect their sources as "very high" and that subject to appropriate exceptions, it is "regarded as a core value protected by Article 10 of the European Convention on Human Rights 1950".
52. Applying the decision in *JMcD v. PL* [2009] IESC 81, [2010] 2 I.R. 199, he held that Article 10 of the Convention is not, as such, directly effective in Irish law but rather has effect only under the conditions actually specified in the 2003 Act. Additionally, following *Carmody v. Minister for Justice* [2009] IESC 71, [2010] 1 I.R. 635, he noted that the court is first required to examine the question presented for resolution under the terms of

the Constitution before considering any rights under the Convention. However, he said at para. 49:-

"... in truth it hardly matters in this case, since the overlap between the two documents with regard to the role of the media is virtually a complete one, even if allowance is made for the fact that, unlike Article 40.6.1, the text of Article 10 of the European Convention on Human Rights does not actually seek to confer on the media a special or privileged position in terms of public debate or in criticism of public policy. In both cases, the approach is the same: has the case for the restriction on or overriding journalistic privilege – I am here returning to the convenient, if slightly inaccurate shorthand – been convincingly established."

53. In weighing the various factors arising in the case before him he refused the relief sought on the basis that the case for compelling the journalist to give evidence had not been "convincingly established".
54. Journalistic privilege was considered again by the High Court in the case of *Ryanair Limited v. Channel 4 Television Corporation* [2017] IEHC 651, [2018] 1 I.R. 734 ("Ryanair"). The plaintiff sued for defamation in respect of a programme broadcast by the first named defendant and produced by the second named defendant. The plaintiff obtained discovery from the defendants and sought inspection of documents over which privilege had been claimed. The defendants objected and asserted, inter alia, that they were entitled to rely on journalistic privilege as a basis for not revealing their sources for the programme. The court was called upon to weigh the balance between two constitutionally protected rights: the right of a journalist to protect his or her sources and the right of the plaintiff to vindicate its good name. The High Court identified the legal basis for the journalistic privilege as being Article 40.6.1.i of the Constitution and Article 10 of the ECHR. The court noted that the plaintiff was entitled to its good name under Article 40.3.2 of the Constitution which provides that:-

"The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

55. Meenan J. in the High Court noted that, unlike legal advice/litigation privilege, journalistic privilege is not absolute and that when carrying out the balancing exercise, the Supreme Court in *Mahon v. Keena* referred to the benefit, if any, that would accrue to the plaintiffs in that case were the court to direct the defendants to reveal their sources. He therefore concluded that in carrying out the balancing exercise the court will examine the necessity of the evidence to the case of the party seeking the disclosure of journalistic sources. He cited with approval the passage at para. 19 of the judgment of the ECtHR in *Goodwin* as follows:-

"It will not be sufficient, per se, for a party seeking disclosure of a source protected by Section 10 to show merely that he will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he or she bases his

claim in order to establish the necessity of disclosure. The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such a prepondering importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached."

56. At para. 65, Meenan J. identified three relevant principles as follows:-

- "(i) The protection afforded by journalistic privilege protects not only the identity of source(s) but, where necessary, the information provided by such source(s);*
- (ii) Unlike legal advice/litigation privilege journalistic privilege is not absolute and may be displaced following a balancing exercise carried out by the court between, on the one hand, the right to freedom of expression and, on the other hand, a legal right such as a person's right to a good name;*
- (iii) A heavy burden rests on the person who seeks disclosure of journalistic source(s). The court must be satisfied that such disclosure is justified by an overriding requirement in the public interest or is essential for the exercise of a legal right."*

57. At para. 69, Meenan J. held that the scope of journalistic privilege is extensive i.e. it protects not only the identity of sources but also information that may lead to the identification of source. Applying these principles, he refused to permit the plaintiff to inspect the documents.

58. In *Mahon v. Keena*, the Supreme Court applied the principles in *Goodwin* to uphold the journalists' right to protect their sources, while in *Cornec* the High Court held that there was no real difference in the level of protection afforded by the Constitution and that provided for by Article 10 of the ECHR. Thus, in addition to these Irish authorities on the scope of journalistic privilege, it is necessary to have regard to the terms of the 2003 Act and the jurisprudence from the ECtHR in respect of the protection of journalistic sources in order to address properly the issues raised in this appeal.

The European Convention on Human Rights Act 2003

59. As has already been pointed out, the long title to the Act states that it is to enable further effect to be given "subject to the Constitution" to certain provisions of the Convention. Section 2(1) provides:-

"In interpreting and applying any statutory provision or rule of law, a court shall, insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

60. Thus, this court, subject to the provisions of the Constitution, is required to interpret and apply the provisions of s. 10 of the 1997 Act insofar as is possible in a manner which is

compatible with the state's obligations under the Convention, subject always to the rules of law relating to such interpretation.

61. Section 3(1) provides:-

"Subject to any statutory provision, other than this Act, or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

62. "Functions" is defined in s. 1 as including powers and duties and references to performance of those functions include references to the exercise of the powers and the performance of the duties.

63. "Organ of the State" includes "a tribunal or any other body (other than...a court) which is established by law or through which any of the... executive or judicial powers of the state are exercised."

64. Section 4 requires that judicial notice be taken of the Convention provisions and, *inter alia*, the judgments of the ECtHR, and provides that "a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those...judgments." Section 5 concerns an application for a declaration of incompatibility, but no such relief was sought by the applicants in these proceedings.

The European Convention on Human Rights

65. I reproduce Article 10 again here for convenience:-

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

66. *Goodwin v. United Kingdom* concerned the application of Article 10 to a journalist who was the subject of a disclosure order requiring him to reveal the identity of his source. He refused to obey the order and he was fined £5,000. The ECtHR addressed the requirement that restrictions on the exercise of freedoms must be "prescribed by law". At para. 31 it held:-

"The relevant national law must be formulated with sufficient precision to enable the person concerned - if need be with appropriate legal advice - to foresee, to a

degree that is reasonable in the circumstances, the consequences which a given action may entail."

67. Having accepted that the impugned measure pursued a legitimate aim, Simons J. then considered whether the interference was "*necessary in a democratic society*". He noted that freedom of expression constitutes "*the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance.*" He said that protection of journalistic sources is one of the basic conditions for press freedom. The court then set out the passage cited by Meenan J. in *Ryanair*. The court concluded in para. 90 with the passage previously cited at para. 22 above.
68. The necessity for any restriction on freedom of expression must be convincingly established. It is for the national authorities to assess whether there is a "*pressing social need*" for the restriction. The margin of appreciation in making that assessment is circumscribed by the interests of democratic society in ensuring and maintaining a free press. The restriction must be proportionate to the legitimate aims pursued: "*In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court.*"
69. The court held that there was not a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve the aim. This was because an *ex parte* interim injunction had already been granted to the company restraining the applicant and the publishers from publishing the relevant information and the injunction had been notified to all national newspapers and relevant journalists. Therefore, the purpose of the disclosure order was, to a very large extent, the same as that which had already been achieved by the injunction. For this reason, the restriction the disclosure order entailed on the journalist's exercise of his freedom of expression was not necessary in a democratic society within the meaning of Article 10(2) for the protection of the company's rights.
70. In *Nordisk Film & TV AS v. Denmark* (App. No. 40485/02) the applicant company produced a programme investigating paedophilia in Denmark which was to be broadcast on national television. A journalist went undercover and posed as a member of an association named "*The Paedophile Association*" and he recorded certain footage. Following the release of some of that footage, the Copenhagen police investigated an individual in relation to alleged breaches of the criminal law. The police sought access to portions of the recordings which were not included in the final film. The company and the journalist were directed by a court to handover a certain portion of the recordings and notes. The company asserted these were protected by journalistic privilege and it challenged the order. At p. 10 the ECtHR held:-

"The protection of journalistic sources is one of the corner stones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Accordingly,

limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court and an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

71. The court noted that the Danish court had balanced the various conflicting interests and the order made was limited to a part of the applicant company's own research material. The order "*concerned the handover of a limited part of the unedited footage as opposed to more drastic **measures such as for example a search of the journalist JB's home and workplace or the applicant company's registered office***" (emphasis added) and was in the circumstances not disproportionate to the legitimate aim pursued. It therefore declared the application to be inadmissible.
72. Perhaps the case which is most relevant to the issues arising in this appeal is *Sanoma Uitgevers B.V. v. The Netherlands* (App. No. 38224/03). The organisers of an illegal street race invited journalists to attend. They took photographs which identified the participating cars and persons at the race. The photographs were stored on a CD-ROM which was kept in the editorial office of a different magazine published by the same company. The police were investigating unrelated serious crime concerning ram raids and they believed that the photographs taken of the illegal street race might assist them in their investigation. The police asked the company to hand over the photographs and the company refused, asserting its journalistic rights under Dutch law. The police then obtained a summons ordering the company to surrender the photographs and the editor of the company refused to do so. The police threatened to detain the editor over the weekend and to seal and search the whole of the company's premises if needs be for the entire weekend and beyond and to remove all of the company's computers. The police arrested the editor for a short period. The company's lawyer made representations on its behalf, both to the public prosecutors and to the investigating judge, despite the fact he had no standing under the relevant procedure. Despite these protests and representations, the police insisted in obtaining the photographs and ultimately the company surrendered the CD-ROM under protest.
73. The company complained that it had been compelled to disclose information to the police that would reveal its journalistic sources in violation of its rights under Article 10 of the Convention. At paras. 50 and 51, the ECtHR restated the importance of the right of journalists to protect their sources in the context of the essential foundations of a democratic society, describing it as "*a cornerstone of freedom of the press*". It reaffirmed the fact that interference with the protection of journalistic sources must be subject to "*special scrutiny*" and is incompatible with Article 10 of the Convention "*unless it is justified by an overriding requirement in the public interest.*" The court held that the fact that the order concerned was not intended to identify the sources themselves in connection with their participation in the illegal street race was not crucial. Likewise, the extent to which the act of compulsion resulted in the actual disclosure or prosecution of journalistic sources is irrelevant for the purposes of determining whether there had been an interference with the right of journalists to protect them. The court referred to its

decision in *Roemen and Schmit v. Luxembourg* where, despite the fact that the information sought was not obtained as a result of the execution of the order for search and seizure in the journalist's workplace, the order was considered "*a more drastic measure than an order to divulge the source's identity ... because investigators who raid a journalist workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. It thus considers that the searches of the first applicant's home and work place undermined the protection of sources to an even greater extent than the measures in issue in Goodwin.*" (emphasis added).

74. In *Sanoma*, the threat to search the company's premises was not carried out as the editor handed over the CD-ROM under protest. The court considered that:-

"72. ... an order for the compulsory surrender of journalistic material which contained information capable of identifying journalistic sources...suffices for the Court to find that this order constitutes, in itself, an interference with the applicant company's freedom to receive and impart information under Article 10 (1)"

75. The ECtHR then considered whether the interference was "*prescribed by law*". The minimum requirements of such law which suffices to safeguard these rights is set out in paras. 88-92 of the judgment:-

"88. Given the vital importance to press freedom of the protection of journalistic sources and of information that could lead to their identification **any interference with the right to protection of such sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake.**

89. The Court notes that **orders to disclose sources potentially have a detrimental impact, not only on the source**, whose identity may be revealed, **but also on the newspaper or other publication against which the order is directed**, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, **and on members of the public**, who have an interest in receiving information imparted through anonymous sources (see, *mutatis mutandis*, *Voskuil v. the Netherlands*, cited above, § 71).

90. **First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body.** The principle that in cases concerning protection of journalistic sources "**the full picture should be before the court**" was highlighted in one of the earliest cases of this nature to be considered by the Convention bodies (*British Broadcasting Corporation*, quoted above (see paragraph 54 above)). **The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to**

prevent unnecessary access to information capable of disclosing the sources' identity if it does not.

91. The Court is well aware that it may be impracticable for the prosecuting authorities to state elaborate reasons for urgent orders or requests. In such situations an independent review carried out at the very least prior to the access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises, and if so, whether in the particular circumstances of the case the public interest invoked by the investigating or prosecuting authorities outweighs the general public interest of source protection. It is clear, in the Court's view, that **the exercise of any independent review that only takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality.**
92. Given the preventive nature of such review **the judge** or other independent and impartial body **must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed** so that the arguments of the authorities seeking the disclosure can be properly assessed. **The decision to be taken should be governed by clear criteria**, including whether a less intrusive measure can suffice to serve the overriding public interests established. **It should be open to the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed**, whether or not they are specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalist's sources (see, for example, *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, cited above). **In situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk** (see, *mutatis mutandis*, *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, §§ 62-66, ECHR 2007-XI)." (emphasis added)
76. It follows from this analysis that any interference with the right to protect journalistic sources and of information that could lead to their identification must be attended with legal procedural safeguards commensurate with the importance of the principle at stake. The first of these is the "guarantee" of review by a judge or other independent and impartial decision-making body separate from the executive and other interested parties. The judge or independent decision-maker must have power to determine *prior to the handing over of any material* whether there is a requirement in the public interest which overrides the principle of protection of journalistic sources. The court or other body must have power to prevent "unnecessary access" to information capable of disclosing the sources identity if it does not. An independent review that only takes place after the handing over of material "capable of revealing such sources" undermines the very

essence of the right to confidentiality. The review by a judge or other independent and impartial body is preventative in nature and the judge must be in a position to weigh the potential risk and respective interests *prior to any disclosure* and *with reference to the material that it is sought to have disclosed* so that the arguments of the authorities seeking the disclosure can be properly assessed. It is important to stress that the court did not require that the review be *inter partes*.

77. The court held that it should be open to the judge or other authority either to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed whether or not they are specifically named in the withheld material.
78. At para. 99, the ECtHR found that where there is no independent review prior to any disclosure of materials, the failings were not cured by the review *ex post factum* offered by the Regional Court in the Netherlands as this was “powerless” to prevent the authorities from examining the photographs stored on the CD-ROM the moment it came into their possession. The court concluded that the quality of law was deficient in that:-

“There was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interests of the criminal investigation overrode the public interest in the protection of journalistic sources. There has accordingly been a violation of Article 10 of the Convention in that the interference complained of was not “prescribed by law”.”

79. It is important to observe that the court acknowledged that in situations of urgency there should be a procedure to identify and isolate, prior to the access and use of obtained materials by the authorities, any information which could lead to the identification of sources from information which carries no such risk. This does not arise on the facts in this case, but it is an important recognition of the practicalities which may present themselves from time to time in certain investigations, particularly in relation to criminal activity, while seeking to uphold the rights of journalists wishing to protect the identity of their sources to have the issue of disclosure determined by a judge or other independent and impartial decision-maker prior to the irremediable loss of the confidentiality attaching to their sources which could otherwise occur.
80. The final decision of the ECtHR to which the court was referred was *Stichting Ostade Blade v. Netherlands* (App. No. 8406/06). In 1995 and 1996, there were three bomb attacks in Arnhem. A group called Earth Liberation Front (ELF) claimed responsibility for the third attack. Stichting published a bi-weekly magazine. The magazine editors issued a press release notifying that its forthcoming edition would include a letter from ELF claiming responsibility for the third bomb attack. The Arnhem Regional Court issued a search warrant for the magazine’s premises and the premises were searched under the supervision of an investigating judge in the context of the criminal investigation into the three bomb attacks. The issue raised in the proceedings was whether ELF could be regarded as a journalistic source entitled to source protection under Article 10 of the Convention. The government argued that a person claiming responsibility for a bomb

attack was not entitled to the same protection as a source supplying information on a matter of public interest.

81. The ECtHR found that the order to the company to hand over the letter and the search of the premises when the order was not obeyed constituted an interference with the company's right to "*receive and impart information*" as set out in Article 10(1) of the Convention. The court then considered the nature of the interference and observed that it does not follow that every individual who is used by a journalist for information is a "*source*" in the sense of the case law in *Goodwin, Roemen and Schmit* and *Sanoma* and other cases. However, even though the protection of a journalistic source properly so called was not in issue, an order directed to a journalist to hand over original materials may still have a chilling effect on the exercise of journalistic freedom of expression. The court therefore held that the journalist was entitled to protection even if the source was not so entitled, though the weight to be afforded to the journalist's protection was diminished in that "*the degree of protection under Article 10...does not necessarily reach the same level as that afforded to journalists when it comes to their right to keep their 'sources' confidential.*"
82. The court held that the magazine's informant was not entitled to the same protection as the "*sources*" in cases like *Goodwin, Roemen and Schmit* and *Sanoma* because the magazine's informant was not motivated by the desire to provide information which the public were entitled to know and, on the contrary, it was claiming responsibility for crimes it had committed.
83. In considering whether the interference was "*necessary in a democratic society*" the court held at para. 70:-

"[The court] cannot but have regard to the inherent dangerousness of the crimes committed, which in its view constitutes sufficient justification for the investigative measures here in issue."

84. And accordingly, the court declared that the application was inadmissible.

Fine Point Films and Birney

85. A recent decision of the Court of Appeal in Northern Ireland in the case of *Fine Point Films and Trevor Birney* [2020] NICA 35 is also relevant to the issues engaged in this appeal. It concerned the circumstances in which the police can use an *ex parte* warrant procedure provided for in the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE"). The Police Ombudsman of Northern Ireland ("PONI") was conducting an investigation into a complaint in respect of the conduct of the police investigation into murders which occurred at Loughinisland in June 1994. The applicants, a company engaged in producing documentaries and two journalists, produced a documentary film about the murders and the police investigation. They obtained copies of two confidential documents from the PONI inquiry and included copies of extracts from the documents in the film. The Director of Current Investigations for the PONI was concerned that the documentary disclosed material relative to the investigation which had been acquired either by theft or

unauthorised disclosure. The Durham Constabulary was conducting a criminal investigation into the alleged theft or unauthorised disclosure of the documents and they obtained an *ex parte* warrant authorising the search of the homes of the two journalists and the business premises of each of the applicants. The applicants sought judicial review to quash the warrant.

86. In Northern Ireland, journalistic sources benefit from statutory protection pursuant to s. 10 of the Contempt of Court Act 1981. Part III of PACE prescribes a detailed regime governing powers of entering, search and seizure of materials for the purposes of a criminal investigation. Provision is made for access to journalistic material as defined in Article 15. Excluded material is defined in Article 13 as including journalistic material which a person holds in confidence and which consists of documents or records other than documents. The application for the warrant in this instance included an application to search and seize excluded material. PACE provides for two procedures, one of which is *ex parte* and one of which is *inter partes*. The Durham Constabulary felt that the *inter partes* procedure was inappropriate in the circumstances and so applied *ex parte* for the search warrant.
87. The Court of Appeal was highly critical of the procedure adopted to procure the warrant at issue in the appeal. The Lord Chief Justice emphasised the breadth of the warrant. It authorised the seizure of journalistic material consisting of all broadcast material together with unedited and un-broadcast footage relating to the documentary film, the two documents referred to in the film, all discussions, interviews, communications and correspondence held on any media storage device, digital recording or other form of mechanical or electronic data, any material supporting a person's involvement in obtaining, possessing or disseminating any such document and any computer, electronic device and/or digital media device including mobile phone in which it is believed such material may be stored.
88. The Court of Appeal said it was a fundamental principle that any *ex parte* hearing is a fair hearing and that the court should impose a heavy onus on those seeking to pursue *ex parte* proceedings to take all reasonable steps to ensure that the proceedings are fair. There was a transcript of the *ex parte* application and the court set out exchanges between the judge, Detective Sergeant Henderson, who gave evidence, and counsel representing the respondents who moved the application. The judge was informed that the police sought the "actual stolen document" and counsel emphasised the sensitivity of the documents and the fact that they could threaten the life or safety of an individual by identifying them. Counsel explained they did not consider the *inter partes* procedure as being appropriate because on a previous occasion one of the journalists had asserted journalistic privilege. He said that it was the view of the police that if they followed that procedure "*that essential opportunities within the investigation will be lost because once they get that notice [to preserve the documents pending the application] police do not know what will be done with the information or what steps may be taken to frustrate securing that information.*" (para 37)

89. Morgan LCJ stated that part of the obligation to take all reasonable steps to ensure that the ex parte hearing is fair is *"to put on a defence hat and ask, what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge. The applicant must, of course, then proceed to tell the judge what those matters are."* The court considered the rights of the applicants to protect their sources. The Lord Chief Justice cited extracts from the decisions of the ECtHR in *Goodwin* and in *Roemen and Schmit* discussed above, and at para. 43 of the judgment the court applied the governing jurisprudence set out in those authorities dealing with the right to freedom of expression of journalists under Article 10 of the ECHR and the associated protection for journalistic sources and press freedom in a democratic society. Morgan LCJ then stated:-

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

90. The court noted that counsel drew the judge's attention to the fact that there was an *inter partes* process for the obtaining of such information under para. 4 of Schedule 1 of PACE but that he did not discuss its terms and conditions in any detail.
91. The Court of Appeal was highly critical of the reasons advanced by the respondents for not availing of the alternative *inter partes* statutory procedure. The court dismissed the respondents' argument that the notice procedure was not practicable or would seriously prejudice their case because any relevant material *"would be"* disposed of by the journalists after serving of the notice on them. The Lord Chief Justice noted at para. 47:-

"This action [asserting journalistic privilege] on the part of [the journalist] was presented to the judge [hearing the ex parte application] in support of the proposition that a journalist adhering to the Code was likely to commit contempt of court by destroying relevant material if notice of an application was served upon him. We reject that submission. If correct it would completely undermine the important role that journalistic sources play in our democratic society."

92. Morgan LCJ was equally disparaging of the manner in which the applicant for the warrant emphasised the importance of Article 2 of the Convention to the judge. He said the fact that the argument could only relate to the two documents and not to all the other material within the scope of the warrant *"should have been made absolutely clear to the trial judge and the failure to do so is inexplicable"*. Likewise, he held that there was *"not a shred of evidence"* to suggest that the disclosure represented a danger to the PONI and therefore it was difficult to see any basis upon which the disclosure of information came within the terms of the relevant provisions of PACE.

93. At para. 55 of his judgment he concluded:-

"...we conclude that the conduct of this hearing fell woefully short of the standard required to ensure that the hearing was fair. That was sufficient for our decision to quash the warrant. We wish to make it clear, however, that on the basis of the material that has been provided to us we see no overriding requirement in the public interest which could have justified an interference with the protection of journalistic sources in this case."

94. The judgment presents a useful examination of the obligations on a party applying *ex parte* for a warrant where the issue of journalistic privilege is engaged. The judgment indicates the type of material which should be placed before the judge by the applicant where the issue of the protection of journalistic sources arises. First, the judge should be informed that Article 10 rights were or potentially were engaged; second, the judge should be provided with the relevant jurisprudence and third, the judge should be informed that the warrant could only be justified by an overriding requirement in the public interest. These obligations derive from the provisions of the ECHR and the judgments of the ECtHR, and are in no way dependent upon the existence of a particular statutory regime.
95. The Court of Appeal concluded that the material before it was not sufficient to satisfy the threshold established in *Goodwin* that the overriding requirement in the public interest justified the interference with the protection of journalistic sources.
96. While it must of course be accepted that the decision was given in the context of a comprehensive statutory code (including the facility for *inter partes* applications) which has no analogue in this jurisdiction, insofar as the observations and conclusions are based upon the nature of an *ex parte* application for a warrant or Article 10 of the Convention and the jurisprudence in relation to the protection of journalistic sources, the differences are not material to the issues arising in this appeal. Noting that the decision prescribes a very detailed set of requirements for the authorities when seeking an order of the kind in issue in this case – but without deciding whether all of these requirements are imposed as a matter of Irish law or are incidents of the specific statutory scheme under consideration – the importance of the decision for the purposes of this case lies in the requirement that before an *ex parte* warrant of the kind in issue in these proceedings may issue, the authorities must at the very least ensure that the judge is aware of the potential engagement of journalistic privilege and that he or she has directed his or her mind to the balancing exercise envisaged by the ECtHR case law. These particular features of an application for a warrant in respect of material potentially captured by journalistic privilege arise from a combination of the very particular public interest engaged where the authorities seek a warrant which may enable them access such material and the legal novelty and complexity presented by that prospect. To be clear, this judgment should not be taken as accepting – or for that matter rejecting – the view suggested by the Northern Ireland Court of Appeal that a concern that persons claiming journalistic privilege might destroy materials of evidential value to a police investigation if aware of a proposed

application for a warrant was a proposition worthy of censure: whether that is so in a given case will depend upon all the facts.

Principles applicable to the protection from disclosure of journalists' sources

97. The following principles relevant to this appeal emerge from provisions of the

Constitution, Article 10 of the ECHR, the 2003 Act and the case law discussed above:

- (1) When an issue concerning the protection of journalists' sources arises, it must first be considered under the provisions of the Constitution and in particular Article 40.6.1.i.
- (2) The protection afforded to journalistic sources under Article 10 of the ECHR is substantively the same as that provided under the Constitution (*Cornec* and *Mahon v. Keena*).
- (3) The protection of journalistic sources guaranteed by Article 40.6.1.i of the Constitution and Article 10 of the Convention is to be attributed a high value.
- (4) Where a court is required to interpret or apply any statutory provisions or rule of law, the court shall so far as possible do so in a manner compatible with the State's obligations under the provisions of the Convention (s. 2 of the 2003 Act).
- (5) For that purpose, a court must take a judicial notice of the provisions of the Convention and judgments of the ECtHR and, when interpreting and applying the Convention provisions, take due account of the principles laid down in, *inter alia*, those judgments (s. 4 of the 2003 Act).
- (6) The constitutional protection for journalistic privilege would be meaningless if the courts could not, or would not, protect the general right of journalists to protect their sources (*Cornec*).
- (7) The right to protect journalistic sources is not absolute.
- (8) The approach of the court whether under the Constitution or the Convention is the same: has the case for the restriction on, or overriding of, journalistic privilege been "convincingly established"?
- (9) Clearly, neither the party seeking to interfere with the right nor the journalist asserting it may decide the issue themselves. It is necessary for a judge to balance the right of a journalist to protect their sources with the rights asserted by the party seeking to interfere with that right (*Mahon v. Keena*).
- (10) A judge must subject any application which will interfere with the protection of journalistic sources with "special" or "careful scrutiny".
- (11) The onus is on the party who seeks to interfere with the right to "convincingly establish" why this should occur.

- (12) The court may only order a journalist to reveal their sources if it is justified by an overriding requirement in the public interest or a pressing social need (*Mahon v. Keena*).
- (13) The interference must be authorised by a procedure "prescribed by law".
- (14) The interference must be for the furtherance of a legitimate interest.
- (15) The interference must be necessary in a democratic society (*Mahon v. Keena* and *Ryanair v. Channel 4 Television*).
- (16) Any interference with the journalistic privilege should be proportionate.
- (17) An order authorising a search of a journalist's home and/or premises is a more drastic measure than an order to divulge the identity of a journalist's source.
- (18) Not every person who provides information to a journalist is a "source" who is entitled to protection under the Constitution or the Convention and, in particular, the privilege may not be asserted in respect of a communication from a person who is themselves an actor in criminal activity whose contact with the journalist is in furtherance of and/or for the purposes of publicising their criminal activity (*Kevin O'Kelly* and *Stichting Ostade Blade*)
- (19) An order for the compulsory surrender of journalistic material which contains information capable of identifying journalistic sources constitutes, in itself, an interference with the journalist's/publisher's freedom to receive and impart information, even if the order is not acted upon and no source is identified.
- (20) This is so even if the source is not a source which attracts Article 10 journalistic privilege. In such circumstances, the journalist still enjoys Article 10 protection but to a lesser extent than when the source also is entitled to protection.
- (21) The review by the judge or other independent and impartial body under Article 10 may be *ex parte*. The question of whether and if so when it is permissible, having regard to the provisions of the Constitution, to issue a warrant on foot of an *ex parte* application in circumstances in which journalistic privilege is or may be engaged has never been decided. However, it is quite clear that – at the very least – there will be circumstances in which the exigencies of an ongoing criminal investigation may require that an *ex parte* application be possible. For reasons I explain later, it is not necessary to decide in this case when those circumstances will arise.
- (22) Where an application is made *ex parte* the full picture must be before the court to enable the court to determine whether a requirement in the public interest overriding the principle of protection of public sources exist.

- (23) The court must be able to prevent unnecessary access to information capable of disclosing the identities of sources.
- (24) The judge should be able to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are specifically named in the material.
- (25) Save in the case of urgency, the review and the balancing of rights must take place prior to the seizure and access of the material.
- (26) An independent review that only takes place after the material which is capable of revealing sources has been handed over is not compatible with the right to confidentiality.
- (27) An *ex post facto* review cannot retrospectively authorise a search which is invalid for breach of these requirements.
- (28) In cases of urgency, it is permissible to seize – but not access – the material prior to the review by the court or other independent and impartial body.

The Criminal Justice (Miscellaneous Provisions) Act 1997 (as amended)

98. Section 10 of the Act of 1997 was substituted by the Criminal Act 2006, s. 6(1)(a). The section provides:-

- "10. (1) *If a judge of the District Court is satisfied by information on oath of a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.*
- (2) *A search warrant under this section shall be expressed, and shall operate, to authorise a named member, accompanied by such other members or persons or both as the member thinks necessary—*
- (a) *to enter, at any time or times within one week of the date of issue of the warrant, on production if so requested of the warrant, and if necessary by the use of reasonable force, the place named in the warrant,*
 - (b) *to search it and any persons found at that place, and*
 - (c) *to seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that that member reasonably believes to be evidence of, or relating to, the commission of an arrestable offence.*

...

(4) *A person who obstructs or attempts to obstruct a member acting under the authority of a search warrant under this section, who fails to comply with a requirement under subsection (3)(a) or who gives a false or misleading name or address to a member shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both."*

99. Applications under s. 10 are made *ex parte* and in chambers to a District Court judge. The application is made on foot of an information on oath by a member of An Garda Síochána not below the rank of sergeant. The District Court judge must be satisfied that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in the place in respect of which the warrant is sought. If these requirements of subs. (1) are met, then the judge "may" issue a warrant for the search of that place and any persons found at that place. The subsection confers a discretion on the judge.
100. The proper legal characterisation the decision of a District Court judge when issuing a warrant has been considered in numerous cases. While different language is used in these decisions, there are essentially four points:
- (i) The issuing of a search warrant is a *sui generis* function.
 - (ii) It is not the administration of justice.
 - (iii) It is instead an administrative or, as it has also been described "*ministerial*" act.
 - (iv) The power must, nonetheless, be exercised "*judicially*"; indeed, sometimes it has been referred to as a "*judicial function*", albeit of a particular kind. Statements of this kind can confuse, as they might suggest an affinity with an administration of justice – which the issuing of a warrant is most definitely not.
101. The Supreme Court addressed the nature of the power in *Damache v. DPP* [2012] IESC 11; [2012] 2 I.R. 266. There, the appellant challenged the constitutionality of s. 29(1) of the Offences Against the State Act 1939 (as amended) which permitted an application for a search warrant to be made to (and such a warrant to be granted by) a member of An Garda Síochána not below the rank of superintendent who was personally involved in the investigation. The Chief Justice reiterated that the issuing of a search warrant is an administrative act and not the administration of justice. She said:-
- "17. *The issuing of a search warrant is an administrative act, but it must be exercised judicially. It was accepted that the full panoply of rights do not apply to the issuing of search warrants. Obviously, the law does not require that a suspect be put on notice of applications to apply for a search warrant...*

...

34. *The issuing of a search warrant is an administrative act, it is not the administration of justice. Thus a search warrant is not required to be issued by a judge. However, it is an action which must be exercised judicially. As Keane J. stated in Simple Imports Ltd. v. Revenue Commissioners [2000] 2 I.R. 243 at p. 251:-*

'The District Judge is no doubt performing a purely ministerial act in issuing the warrant. He or she does not purport to adjudicate on any lis in issuing the warrant. He or she would clearly be entitled to rely on material, such as hearsay, which would not be admissible in legal proceedings.'

102. At paras. 47 and 51, she set out the procedural requirements to be followed in obtaining a search warrant:-

"47. The procedure for obtaining a search warrant should adhere to fundamental principles encapsulating an independent decision maker, in a process which may be reviewed. The process should achieve the proportionate balance between the requirements of the common good and the protection of an individual's rights. To these fundamental principles as to the process there may be exceptions, for example when there is an urgent matter.

...

51. The court applies the following principles. For the process in obtaining a search warrant to be meaningful, it is necessary for the person authorising the search to be able to assess the conflicting interests of the State and the individual in an impartial manner. Thus, the person should be independent of the issue and act judicially. Also, there should be reasonable grounds established that an offence has been committed and that there may be evidence to be found at the place of the search."

103. The issue was also addressed by Fennelly J. sitting in the Court of Criminal Appeal in *The People (DPP) v. Tallant* [2003] 4 I.R. 343. The court was considering a challenge to a warrant based on the quality of the evidence upon which a District Court judge may act. Fennelly J. said that a reviewing court must look at the totality of the evidence given in the District Court at the time of the application for a warrant. He then said at para. 8:-

"This is not an inter partes matter: it is not a criminal prosecution in itself. It is an administrative procedure in the first instance insofar as the Garda Síochána set it in motion. It is a judicial procedure of a very particular kind, namely, one where the Garda Síochána has to satisfy the District Court that there is sufficient reason to search the premises of the person named in the warrant...the constitutional protection of the integrity of the home of the individual immediately comes into play and the court must be vigilant to ensure that there is not any undue or improper invasion of that constitutional right to the sacrosanct character of the home of the person who is an individual citizen. On the other hand, of course, the gardai (sic) are engaged in carrying out their public duty to investigate crime and a

proper balance has to be struck between these two objectives; so, in collecting evidence all proper respect has to be accorded to the protection of the constitutional right of every individual citizen in respect of his home and, therefore, any invasion of that must take place only on the basis that proper judicial procedures have been carried out."

104. In *The People (DPP) v. FR* [2019] IECA 212 Edwards J. approved this passage from Tallant and stated that it *"correctly identified that the process of applying for a search warrant is in fact a two stage one "involving in stage one the application by the gardaí for a warrant, which may be characterised as an administrative function (or executive function, as it was labelled in the earlier case) whereas the actual issuing of the warrant, which occurs in stage two, is a judicial function but one of "a very particular kind"."*

105. The issue in *F.R.* turned upon an application for the search warrant based in part on hearsay evidence and whether the failure to make this clear to the District Court judge impacted the validity of the warrant. It was argued that the warrant was defective because the applicant did not disclose to the judge that the information or intelligence referred to in the sworn information was not personally known to her but, rather, was hearsay. The court held that the application for a warrant is in effect a *sui generis* procedure and that the rule against hearsay had no application to applications for search warrants. What was important was not whether the intelligence being relied upon was hearsay but rather whether it was considered to be reliable. In para. 45 the court held:-

"45. ... Moreover, it would not have been within the District Court judge's remit to treat the application for a warrant as though it were a trial, and in the absence of some red flag suggesting a serious problem with reliability to seek to rigorously stress test the actual reliability of that which was asserted in the information in writing. It is sufficient in such a case if the District Court judge satisfies himself/herself that the informant believes the intelligence relied upon to be reliable, in circumstances where it is not manifestly unreasonable that the informant should so believe. As occurred in this case, where intelligence is being relied upon in whole or in part, a simple question to the informant seeking confirmation that he/she believes what is stated in the information to be correct, should suffice in most cases. There will, of course, and from time to time, be cases in which, because of their particular or unusual circumstances, some greater level of inquiry would be justified. ..."

106. Having concluded that the crucial point is that the District Court judge satisfies himself/herself that the informant believes the intelligence relied upon to be reliable rather than whether it is hearsay or not, the court concluded that there was no breach of a duty of candour. The essence of the case is that the omission complained of was irrelevant and accordingly the failure to bring irrelevant material to the attention of a District Court judge could not invalidate the warrant.

107. Furthermore, the Court expressly noted that there will be cases in which, depending on the circumstances, a greater level of enquiry would be justified. The court referred to a

red flag alerting the district court of the need to be extra vigilant in his or her scrutiny of the application. Application for warrants that may engage journalistic privilege are one such situation.

Discussion

108. Section 10 of the 1997 Act does not enable the District Court judge to conduct an *inter partes* hearing. In the High Court the parties agreed this was so and I see no basis upon which the statute could be construed to permit, never mind require, such procedure. The decision of the District Court judge on an application for a search warrant is binary: whether or not to grant the warrant. The judge should refuse to grant the warrant if the judge is not satisfied that there are reasonable grounds within the meaning of the section. But the judge has a further decision to make; whether in the circumstances to exercise their discretion to issue the warrant. In reaching his or her decision the judge is required to act judicially.
109. This means that in cases where it arises the judge should take account of the constitutionally protected right of journalists to protect the identity of their sources from disclosure. Those rights must be weighed in the balance. The fact that s.10(1) makes no reference to consideration of *inter alia* journalistic privilege does not preclude this.
110. The right not to disclose journalistic sources is a constitutionally guaranteed right, albeit one which is not absolute. It is also a right guaranteed by Article 10 of ECHR. Courts are required to interpret statutes in a manner which gives effect both to constitutionally guaranteed rights and to rights derived from the Convention and decisions of ECtHR. Interference with a journalist's right to protect their sources may only be justified by an overriding requirement in the public interest or a pressing social need. This must be "*convincingly established*" by the applicant for the warrant. The court must approach the application for a search warrant with "*special*" and "*close scrutiny*". Only if these prior requirements have been satisfied - in addition to the requirements in s.10 - may the court issue the warrant.
111. As I have previously explained, there will be circumstances in which this exercise may be conducted on foot of an *ex parte* application. No authority was open to the court which suggested otherwise, and the decisions of ECtHR are consistent only with this being possible. Where an *ex parte* application is made and is appropriate, the applicant for the warrant must place before the judge the information necessary to enable the judge to perform his or her task properly under the section, the Constitution and the Convention.
112. This imposes a full disclosure obligation on an applicant for a search warrant. The obligation is to place all information before the District Court judge which is relevant to their decision. This may be factual, but it may also be legal.
113. Generally, I would agree with the decision of the Northern Ireland Court of Appeal in *Fine Point Films* in this regard, although it must be stressed that the exercise of seeking an *ex parte* warrant should not be converted into a full blown trial. It is sufficient if the judge is advised that the warrant may result in the seizure of material captured by journalistic

privilege, if the judge is advised of his or her obligation to take account of this in issuing the warrant, and if a legally sufficient basis for overriding that privilege is identified and explained. Further details may need to be provided to the District Court judge, depending on the circumstances, but this is the minimum where an applicant seeks a search warrant of a journalist's home or place of work based on his or her actions as a journalist.

114. Where a search warrant is sought in respect of a suspect or person of interest in a criminal investigation who coincidentally is a journalist, the balance to be struck between the public interest in the investigation of crime and the protection of journalistic sources still requires to be struck, not least because the rights of the journalist's sources to protection may be impacted by a search warrant. However, the weight to be afforded to the journalist's right to protect his or her sources in the circumstances will be far less and may not even arise at all when they personally are directly of interest in an investigation which is unrelated to their role as a journalist and thus in the freedom of the press in a democratic society.
115. In this regard it is worth recalling that in *Stichting Ostade* the investigating judge conducted no balancing exercise before directing the seizure of the letter the subject of the proceedings. The ECtHR simply determined that the document was not protected by the asserted privilege as the "source" was in fact the perpetrator of an offence seeking publicity through the magazine. The failure to undertake the balancing exercise was not adverted to and was not a valid basis for challenging the validity of the order where the "source" was not protected by Article 10.
116. In my opinion, it is not sufficient for a District Court judge to glean from the sworn information that the warrant is not only to search the home and workplace of a citizen – which engages rights which arise in respect of many warrants – but also the separate rights of a journalist to protect their sources, which rights are guaranteed both under the Constitution and the ECHR. This is a complex, evolving area of law where it is appropriate to require the applicant for a warrant to search a journalist's home or office in an ex parte procedure to assist the District Court judge by expressly adverted to the fact that the issue of the protection of journalistic sources is or may be engaged, the requirement to balance protection of this constitutionally guaranteed right with the exigencies of the garda investigation and the threshold test which is required to be satisfied if that right is to be interfered with.
117. The fact that the procedure is *ex parte* does not absolve the District Court judge from the obligation to satisfy himself or herself that the applicant for the search warrant has convincingly established that there is an overriding requirement in the public interest or a pressing social need which justifies the interference with the journalist's right to protect the identity of their sources.
118. The Supreme Court in *Mahon v. Keena* established that this is the test to be applied when assessing whether a journalist's asserted privilege is to be overridden. The decision of ECtHR in *Sanoma* is crystal clear: the balancing of the requirement in the public interest and the right of a journalist to protect their sources must, save in cases of urgency, occur

prior to the issuing of a warrant. An independent review that only takes place after material which is capable of revealing sources has been handed over is not compatible with the right to confidentiality. An *ex post facto* review where no such prior balancing has been undertaken by a judge or independent and impartial body does not satisfy the requirements of Article 10 and accordingly of Article 40.6.1.i.

119. In *Cornec* it was pointed out that the constitutional right of journalists to protect their sources would be meaningless if the courts would not or could not protect the general right of journalists to protect their sources. A search warrant of a journalist's home or place of business permits the applicant to access all of the journalist's records and information in either location. Frequently such information may be on devices which are password protected and therefore not immediately accessible. That is not the point. There is absolutely no guarantee that a search warrant will not entail disclosure either of details of sources or of material which contains information capable of identifying journalists' sources which are not in any way protected. For example, a phone bill may reveal the phone numbers of sources and the letters at issue in *Mahon v. Keena* and in *Fine Point Films* were not so protected.
120. Therefore, the fact that the only item seized in this case was Mr. Corcoran's phone which happened to be password protected and that therefore *as a matter of fact* no material was assessed before the High Court granted an injunction on 4 April 2019 is, to my mind, irrelevant.
121. The validity of the warrant cannot depend upon the chance that the material sought was password protected and that the journalist was in a position to obtain an injunction prior to the gardaí accessing the material on the phone.
122. This conclusion is reinforced by the decision of ECtHR that an order for the compulsory surrender of journalistic material which contains information capable of identifying journalistic sources constitutes *in itself* an interference with the journalist's/publisher's freedom to receive and import information, *even if the order is not acted upon and no source is identified*. Therefore, the fact that material could not be accessed does not mean there has been no interference with journalistic privilege: the fact the warrant issued constituted an interference with the rights of the applicants which could only be granted if the applicant had convincingly established that it was required by an overriding requirement in the public interest.
123. The decisions of ECtHR I have considered earlier make it clear that for the purposes of the Convention, it is entirely permissible for a judge or other independent body to decide without hearing the journalist affected whether to authorise search and seizure of materials the subject of journalistic privilege *provided* the judicial or other authority has undertaken the relevant balancing exercise.
124. It may well be that there will be circumstances in which under Irish law it is not appropriate that this exercise be conducted on foot of an *ex parte* application and, to that extent, Irish law is deficient in failing to provide for a procedure of the kind considered in

Fine Point Films whereby an *inter partes* hearing can be conducted while at the same time enabling protection of the information against destruction pending that hearing.

125. However, (as indeed those same provisions of Northern Irish law make clear) there will be cases in which it is both appropriate and necessary for a judge to make these decisions *ex parte*. It is not unlikely that one of the situations in which an *ex parte* adjudication is appropriate is where the person asserting journalistic privilege is not merely the custodian of information, but is also a person of interest to the investigation. It is not necessary to decide this issue here : what is relevant for the purposes of this application is that where an *ex parte* application is made, there are very strict requirements attending it and these were not observed here.
126. In this regard it is appropriate to observe that in the High Court both parties agreed that s.10 did not permit the District Court judge to conduct an *inter partes* hearing *and therefore* they did not contend for an interpretation of the section which would enable the District Court to carry out a balancing of rights for the purposes of Article 40.6.1.i of the Constitution on foot of an *ex parte* application. This led to the trial judge to conclude that an interpretation of the section which excluded the possibility of an *inter partes* hearing had the consequences that no balancing exercise of the type contended for by the applicants *could* be carried out by the District Court judge on an application for a search warrant.
127. In fairness to the trial judge it must be acknowledged that the arguments have moved on and been refined during debate with this court and he is not to be criticised for the conclusions he reached in light of the fact that the parties proceeded on the assumption that an *inter partes* hearing was *required* in order for there to be a balancing of rights for the purposes of Article 40.6.1.i of the Constitution and Article 10 of the ECHR.
128. However, this, in my opinion, led the trial judge into error when he concluded in para. 83 of his principal judgment that, on the basis that the application for a search warrant is to be made *ex parte* only, the District Court's function is *confined principally* to determining whether there are "*reasonable grounds*" for suspecting that evidence of, or relating to, the commission of an arrestable offence (as defined) is to be found in the place in respect of which the warrant is sought and that the District Court does not have jurisdiction to *determine* any issue in respect of journalistic privilege.
129. This error in turn led the trial judge to misapply the jurisprudence of both the Irish courts and the ECtHR. He failed to start from the premise that the applicants enjoyed a constitutional right and rights under Article 10 and that any interference with this right requires to be closely scrutinised by the court. It was for Sergeant Siggins, the applicant for the search warrant, to establish convincingly to the District Court judge that it was an overriding requirement in the public interest that their journalist privilege be interfered with; that this assessment must take place prior to the issue of the warrant and that an *ex post facto* review, where no such assessment had occurred in the District Court, did not remedy this fundamental defect in the application for the warrant.

130. A judge is presumed to know and apply the law and, on one view of the facts in this case, this court could therefore conclude that the District Court judge knew that the application for the warrant engaged the question of protection of journalistic sources, that he weighed that constitutionally protected right in the balance before he determined to issue the warrant, notwithstanding the fact that it was never brought to his attention that such rights were engaged. On the facts of this case I am not satisfied that this court should so proceed.
131. The Commissioner accepted in submissions that there was no balancing of rights in the application for the warrant pursuant to s. 10 in this case but says that any dispute on this issue "must be resolved elsewhere". It follows that in this case the breach of the rights of the applicants is clearer than in *Fine Point Films*; this court has in effect been informed what occurred before the District Court judge and it is clear that he did not apply the correct test, which I have identified, when he granted the warrant in this case.
132. The fact that rights under Article 40.6.1.i of the Constitution and Article 10 of the ECHR were engaged was not brought to his attention and indeed none of the minimum matters identified in *Fine Point Films* appear to have been brought to his attention. Sergeant Siggins' affidavits do not suggest that anything other than what was set out in his sworn information was presented to the District Court judge and the Commissioner's submissions would lead to this conclusion. For this reason, in my judgment it is clear that the Commissioner has not shown that the District Court judge was given the information necessary to decide whether in the circumstances of this case it was appropriate to issue a warrant. Had he been given that information, he may well have decided that the material captured by the warrant was not subject to privilege or that if it was, the circumstances were such that that privilege did not outweigh the interest of the State in the investigation or prosecution of the offences in question. It follows that the warrant was issued in breach of the applicants' rights under Article 40.6.1.i of the Constitution and the Commissioner was not entitled to search Mr Corcoran's home on foot of the warrant or to seize his mobile phone or to access any data on the phone.
133. In argument, counsel for the applicants, Mr. McDowell SC, contended that the warrant was invalid because Sergeant Siggins did not refer in his sworn information to the fact that the applicants had asserted journalistic privilege over the identity of their sources when he applied for the warrant. Counsel argued that the applicant for a warrant is under a full disclosure obligation and that Sergeant Siggins failed to comply with this obligation.
134. Counsel for the Commissioner, Mr Callanan SC, submitted that there was no such obligation. I do not agree. Where the application for a warrant is made *ex parte*, this brings with it the attendant full disclosure obligation. To hold otherwise would be to endorse an unfair procedure.
135. However, it is important to emphasise that the rights of the applicants did not – and could not – depend on whether or not they had expressly asserted them prior to the application for a search warrant. Such a requirement would greatly dilute the effectiveness of the privilege and is not supported by any authority. It follows that the failure to refer to this

fact in the sworn information is not *the* fatal flaw in this case. The flaw, in my judgment, is the failure to inform the District Court judge of those minimum matters identified in *Fine Point Films*, while adding that, on the facts in this case, *in addition*, the District Court judge ought to have been informed of the fact that the applicants had already asserted journalistic privilege in respect of the material sought to be captured by the warrant: the identity of Mr Corcoran's source(s).

136. It is essential that a District Court judge is able to balance fairly the interests of the public in the investigation of serious crime, in this instance, and the rights of the journalist and his or her sources, on the other hand and then decide which of two competing interests is to prevail. If the court is not alerted to the fact there is such a clash of interests, it cannot resolve it. Likewise, if it does not have a complete picture of the facts as then known to the applicant for the warrant, the court is most unlikely to be able to balance these competing rights in accordance with the requirements of the Constitution and the Convention.
137. The trial judge was of the view that the failure by the applicants to challenge the constitutionality of s.10 of the 1997 Act constrained them from arguing that the seizure of Mr Corcoran's phone was unlawful. At para. 90 he held that:-

*"The Applicants' case is predicated on an **assumption** that, in the circumstances outlined in Mr. Corcoran's affidavits, they are entitled to rely on journalistic privilege to resist disclosure of the content of the mobile phone. The Applicants' criticisms of the procedures adopted by An Garda Síochána all flow from that assumption."*

138. This passage appears to reverse the onus of proof required by the judgments of the ECtHR, which applies equally to the rights guaranteed under Article 40.6.1.i. It is for the applicant for the search warrant to convincingly establish that the warrant should issue, not for the journalist to establish that it ought not. So, the starting point ought to have been to examine the case put forward by Sergeant Siggins for the warrant and then to determine whether he had convincingly established that there was an overriding requirement in the public interest which required that the journalistic privilege should be interfered with and they should be compelled to reveal their sources.
139. The trial judge did not determine the validity of the warrant but instead proceeded to weight the countervailing factors against the asserted public interest in protecting journalistic sources. He concluded that the appropriate balance lay in granting An Garda Síochána limited access to data on Mr. Corcoran's phone. However, the trial judge was performing *ex post facto* the function that was required to be conducted prior to the issue of the warrant. This is clear from *Sanoma*, where the subsequent decision by the Amsterdam Regional Court was held not to be sufficient to correct the prior failure to vindicate the rights of the journalist in that case. The procedure adopted by the High Court could not remedy the breach which had already occurred in this case.

140. The warrant was obtained in breach of the constitutional rights of the applicants. It is not necessary for the applicants to challenge the constitutionality of s.10 or, indeed, to seek an Incompatibility Order under s.5 of the 2003 Act in respect of s.10 for this court to so conclude. That being so, when Sergeant Siggins demanded that Mr Corcoran surrender his mobile phone to Sergeant Siggins, he had no lawful authority to make that demand and no lawful right to seize and retain the phone against the wishes of the applicants.
141. At para. D5 of the statement required to ground the application for judicial review the applicants sought "*An order of Certiorari by way of application for judicial review setting aside the warrant of the District judge (Judge James Faughnan) authorising the search of the home of the first applicant and/or the offices of the second applicant.*"
142. In light of this pleading, I am satisfied that the applicants were entitled to advance the case that the warrant should be set aside and there was no requirement that they challenge the constitutionality of s.10.
143. Mr McDowell, counsel for the applicants, submitted that s.10 in its general application was not per se unconstitutional or incompatible with the ECHR. It was the particular application for a warrant in this instance which failed to vindicate the guaranteed constitutional rights and convention rights of the applicants which rendered the procedure whereby the warrant was issued unlawful and accordingly affords the basis for an order of *certiorari* setting aside the warrant.
144. In my judgment the trial judge erred when he failed to rule on the lawfulness of the warrant which issued in this case. Absent a lawful warrant, the Commissioner had no entitlement to seize the mobile phone or to access any of the data contained on the phone. It was critical that the trial judge reach a conclusion on this point...
145. It was argued on behalf of the applicants that s.10 did not provide a procedure which protected journalistic sources in a manner compatible with the Constitution and the Convention and accordingly there was no procedure established by law as required by Article 10 for determining the issue whether journalistic privilege was overridden by the requirements of the public interest.
146. For the reasons I have set out, in my judgment s.10 *may* provide in some circumstances an appropriate procedure for an application for a search warrant of journalistic material or a journalist's home or work place *provided* that sufficient information, both as to fact and as to law, is placed before the District Court judge to whom the application for the warrant is made. This is permissible under s.10 and therefore I do not believe that s.10 is incompatible with the Constitution and therefore the failure to seek an order that it is incompatible with the constitution is not fatal to the applicants' case.
147. However, it must be said, that it would undoubtedly be preferable if the Oireachtas legislated in this complex area and established a clear constitutional and conventional compliant procedure analogous to that in the Criminal Justice (Miscellaneous Provisions)

Act, 2011 in respect of legal professional privilege or that which exists in Northern Ireland.

148. Of particular concern is the fact that the District Court judge has no power to make a qualified order as envisaged by the jurisprudence of the ECtHR which requires that orders authorising interference with the rights of journalists to protect their sources should be proportionate. The ECtHR has stated that disclosure orders are less intrusive, and accordingly preferable, than search warrants of the homes or business premises of journalists. In this case had it been possible simply to obtain an order directing Mr Corcoran to disclose his sources this might well have sufficed for the purposes of the investigation, though I accept that it in many cases it may not. The fact remains that it was not possible to obtain a limited order of this kind, which incidentally would have made clear the fact that the issue of journalistic privilege was central to the issue of whether or not to grant the warrant.
149. The power to limit and qualify orders is an important power which would enable a District Court judge to act proportionately. This is a matter to which the Oireachtas should give urgent attention, given the importance of journalistic privilege as a cornerstone of free speech and its role in a democratic state.
150. It is also worth noting the importance of the existence of the transcript of the hearing in the decision in *Fine Point Films*. It is debatable whether the Court of Appeal could have reached its conclusion in the manner it did on the application for judicial review in that case in the absence of the transcript.
151. In *Damache* at para. 58 the Supreme Court pointed out that it is best practice to keep a record of the basis upon which a search warrant is granted. It might indeed be preferable for there to be recordings of hearings which could be transcribed if required, and this too is a matter which ought to be further considered.
152. While generally speaking, there may be difficulties in applying for a search warrant pursuant to s.10 where issues of journalistic privilege arise, unusually in this case it may in fact be possible to apply for and obtain a warrant under the section in a manner which does not impermissibly breach the applicants' right to protect their sources. The fact that the warrant should be quashed is not the end of the matter. A member of An Garda Síochána may apply for a second warrant if it is deemed necessary and the other elements of s.10 discussed above can be satisfied. The rights of the applicants will fall to be weighed by the District Court judge. As this is a matter which may fall to a District Court judge to assess on a future occasion, I refrain from expressing a view as to outcome of that assessment. It must be conducted in accordance with the principles identified in this judgment and I would expect the District Court judge to have regard to the observations of the High Court insofar as the same issues of fact may present themselves on any such future application for a warrant.
153. The question whether a District Court judge issuing a search warrant is a court for the purposes of s.2 and 4 of the 2003 Act or an organ of the state exercising executive or

judicial power for the purposes of s.3 of the 2003 Act was debated at the hearing of the appeal. However, as it is not necessary to resolve this issue in order to determine the appeal, I refrain from so doing and leave the issue to be resolved in a case where such a determination is required.

Conclusions

154. It is open to a member of An Garda Síochána to apply in at least some circumstances *ex parte* to a District Court judge for a search warrant of a journalist's home or place of work under s. 10 of the 1997 Act provide that the minimum safeguards identified are observed. The District Court judge must be informed that the application engages or potentially engages journalistic privilege, that this privilege is protected by the Constitution and the Convention, that it may be overridden, that the judge may only issue the warrant if the applicant convincingly establishes that there is an overriding requirement in the public interest that justifies such an order. The applicant is under an obligation to make full disclosure in order that the District Court judge may properly balance the competing rights of the public interest in the investigation and prevention of crime and the rights of journalists, their sources and the general public in the protection of journalistic sources from disclosure. A warrant issued where these minimum requirements are not met may be quashed. A review and *ex post facto* balancing of the rights after a warrant has issued and after it has been executed is not compliant with the requirements of the Constitution. The very fact of the issuing of the warrant to search the home or place of business of a journalist, even if it is not executed or no journalistic material is seized on foot of it, may in some circumstances amount to a breach of the rights of a journalists, and their sources, under the Constitution. Accordingly, the warrant that issued in this case ought to be quashed.
155. Mr Corcoran's mobile phone should be returned to him and the Commissioner is not entitled to access any information from the phone pursuant to the warrant issued on 2 April 2019.
156. I would allow the applicants' appeal against the order of the High Court directing that certain data on Mr Corcoran's phone be made available to An Garda Síochána and I would direct the return of the phone to Mr Corcoran.
157. I would refuse the Commissioner's cross appeal in relation to the disclosure of Mr Corcoran's contacts on his phone.
158. The Commissioner's appeal in relation to the costs of the judicial review was left over until the substance of the appeal was decided by this court. Accordingly, it will be necessary to hear submissions from counsel as to the form of order which should follow this judgment and as to the costs of the appeal and of the High Court.
159. Murray and Donnelly JJ. have read the judgment in advance and have indicated their agreement with this judgment.