An Chúirt Uachtarach

The Supreme Court

O'Donnell J
McKechnie J
MacMenamin J
Charleton J
O'Malley J

Supreme Court appeal number: S:AP:IE:2020:000064
[2020] IESC 007
High Court record number 2018/872JR
[2020] IEHC 222

Between

Kevin Braney
Accused/Appellant

- and -

Ireland and the Attorney General
Respondent

- and -

The Director of Public Prosecutions
Notice Party

Judgment of Mr Justice Peter Charleton delivered on Friday 12 February 2021

1. Kevin Braney stands convicted that on 2 August 2017 he was a member of the self-styled Irish Republican Army or Óglaigh na hÉireann. He challenges the validity of s 30(3) of the Offences Against the State Act 1939, the police power on which he was arrested and questioned. This authorises the gardaí to arrest a suspect on reasonable suspicion of certain very serious offences. These are offences scheduled under the 1939 Act. Since the Criminal Justice Act 1984, under general arrest powers applying to all offences carrying a possible maximum penalty of 5 years imprisonment or more, an arrestee's detention for questioning in a Garda station must also be authorised as

necessary for the investigation of the offence by another Garda officer in charge of the station; s4(2) of the 1984 Act. Section 30 of the 1939 Act does not require this. Initially, a person arrested under s 30(3) may be held and questioned for up to 24 hours. Section 30(3) also enables the initial 24 hours of detention upon arrest to be extended for a further 24 hours on the authorisation of a Chief Superintendent, who is not necessarily a Garda officer independent of the enquiry which led to the suspect's arrest. It is contended by Kevin Braney that, under the Constitution and the European Convention on Human Rights, for a detention for investigation or questioning to be valid, a second opinion, from the Garda in charge of the station, as to the validity of the arrest and the necessity for detention, is required.

2. Further, arguing on the basis of what is claimed to be an analogous police power, that of the search of a home, the accused asserts, invoking *Damache v DPP & Others* [2012] IESC 11, [2012] 2 IR 266, that, apart from emergency, since only a judge or an uninvolved police officer may issue a search warrant, similarly only a judge or an uninvolved police officer can extend the initial 24 hours of detention by a further 24 hours. Here, it might immediately be noted that detention outside s 30 arrest is extended by a police officer: thereby a 6 hour detention can become a 12 hour detention upon arrest; s4(3)(b) of the 1984 Act. In so far as there is a difference between the procedures for arrest and detention as between s 30 and other forms of arrest and detention for different offences, this is argued by Kevin Braney to infringe Article 40.1 of the Constitution whereby all "citizens … as human persons" are to be "held equal before the law". This difference in procedures is also argued to be incompatible with the European Convention on Human Rights.

3. In *The People (DPP) v Quilligan and O'Reilly (No 3)* [1993] 2 IR 305, this Court has already held that the provisions of s 30 of the 1939 Act were not repugnant to the Constitution. The accused asks for this authority to be reviewed. The standard whereby this Court might overturn precedent thus requires analysis. Finally, issues as to inferences from failure to answer pertinent questions relevant to a charge of membership of an unlawful organisation, a scheduled offence under the 1939 Act, are also brought into contention by Kevin Braney and are asserted to be unconstitutional and incompatible with the Convention.

4. By determination dated 30 July 2020, this court granted leave to appeal from the ruling of the High Court, Barr J [2020] IEHC 222, dismissing the claims of unconstitutionality and incompatibility; [2020] IESCDET 95. This was done mainly on the basis of the binding precedent in *Quilligan and O'Reilly*. The issues raised in the application for leave were regarded as being of general public importance and because of the binding precedent governing any appeal, this in part constituted an exceptional but not automatic circumstance justifying a direct appeal to this Court from the High Court.

Approach to facts

5. It was by a process of judicial review as to the constitutionality and compatibility of s 30 that this case reached the High Court, and not by an appeal to the Court of Appeal from the conviction for a criminal offence. Following a two-week trial, Kevin Braney was convicted before the Special Criminal Court on 30 May 2018 of membership of an unlawful organisation, styling itself the Irish Republican Army or Óglaigh na hÉireann. The Defence Forces of Ireland are properly called Óglaigh na hÉireann; military.ie. Other organisations claiming to be the 'Army' of the Irish Republic and usurping the

legitimate army of the State, for terrorist purposes, are prescribed organisations under the Offences Against the State Act 1939. Membership of such is an offence carrying a potential maximum penalty of eight years imprisonment; s21(2)(b) of the 1939 Act, as amended. Kevin Braney was imprisoned, following a written ruling of the Special Criminal Court finding him guilty of that offence, for four years and six months.

6. In light of the ordinarily binding nature of facts found by the High Court when an appeal is brought, the circumstances whereby Kevin Braney mounts this challenge to the constitutionality of s 30(3) of the 1939 Act are properly to be derived from the judgment of Barr J; *Ryanair v Billigfluege.de GmbH and others* [2015] IESC 11 as to affidavit evidence and an appellant bearing the burden of proof that facts found were unreasonable and *Doyle v Banville* [2012] IESC 25 and *Hay v O'Grady* [1992] 1 IR 210 as to the binding nature of a finding on oral evidence.

Background facts

7. Initially, the High Court set out the event which was central to the charge that on 2 August 2017 Kevin Braney was a member of the self-styled Irish Republican Army or Óglaigh na hÉireann. Barr J set out that he was arrested by a police officer on that day, the day to which the charge relates, and that he was detained initially on foot of that arrest for 24 hours and that the detention was extended for a further 24 hours by Chief Superintendent Thomas Maguire in accordance with the impugned section. The circumstances prior to the arrest and as a basis for the findings of the Special Criminal Court at Kevin Braney's criminal trial were set out by Barr J thus:

> 8. The background to that arrest arose in the following circumstances: the applicant had been seen on a number of occasions prior to 13th July, 2017 in the company of, and in conversation with, men who had been convicted of various offences contrary to the 1939 Act. In particular, the applicant had been present as a member of the public at a sentence hearing before the Special Criminal Court held on 6th February, 2017 when one Patrick Brennan was being sentenced for possession of explosives and detonators. Evidence was given that in the course of the sentence hearing, the court put it to Mr. Brennan that he would need to undertake to renounce subversive activities if he wished to avail of a suspension of two years of the proposed sentence of seven years. At the applicant's trial, a Sergeant Boyce gave evidence that when this was put to Mr. Brennan, he looked over at the applicant and then declined to make any indication that he would renounce subversive activities and accordingly the sentence of seven years stood.
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> 9. The pivotal evidence at the trial, concerned the applicant's movements and activities on 13th July, 2017. Evidence was given by a member of the Garda Surveillance Unit that at 13.02 hours he observed the applicant, and his co-accused meeting at the Clearwater Shopping Centre in Dublin. Later at approx. 19.38 hours, the car owned by the co-accused, Mr. Maguire, was observed driving through the toll bridge at Enfield on the N4. When the Garda conveyed that message over the radio system he subsequently received an instruction to go to Oakley Park, Longwood, which was situated on the Trim Road outside the village of Enfield, Co. Meath. There he observed Mr. Maguire's car parked in Oakleigh estate. He observed the applicant and Mr. Maguire crossing to Oakleigh Drive and enter the driveway of a house. He saw the two men at the front door of the

> house. That was at 19.57 hours. He was not in a position to maintain observation after that time until 20.05 hours. At that time, he observed the driveway of the house where he had seen the applicant and Mr. Maguire, but they were no longer there. Mr. Maguire's car was gone from the Oakleigh estate across the road. The house which they had visited was no. 8 Oakleigh Drive, which was the home of a Mr. Moore.
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> 10. Mr. Moore gave the critical evidence at the trial. In summary, he stated that he had worked for a particular man as a builder's labourer. He made a statement to Gardaí that on 13th July, 2017 at approx. 19.30/20.00 hours he was in the bathroom when he heard heavy knocking coming through the front door and window. When he came out of the bathroom he saw two people at the door. He stated that it was obvious from the way that they were knocking that there were not there as he put it "to read the meter". He went upstairs because they had left and he could see two people walking away from the house. He believed that when they observed him in the window, they turned around and came back to speak with him. He asked if he could help them and they asked for his name, which he gave to them. They said that they wanted to speak to him and he said that he could hear them from where he was, so that they could speak to him at the window.
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> 11. Mr. Moore said that the men said "We don't want to shout it all over the street. You have a claim in against Nicholas Duffy". Mr. Moore replied that he had a claim in against the insurance. One of the men said "Nicholas Duffy does an awful lot of work for the Republicans of Portlaoise Prison. So, what you're going to do is you are going to ring your solicitor in the morning, you're going to drop the case because it's fraudulent". Mr. Moore stated that he replied "It's fraudulent, is it?" and one of the men replied "Yeah, it is. We are the IRA, and the next time we come down to see you, we'll be coming down to shoot you". He stated that after that the men walked away across the road. After the incident he contacted the Gardaí.

8. The High Court also analysed the judgment of the Special Criminal Court in convicting Kevin Braney. Barr J set out the reasoning for his conviction at paragraph 15 of the High Court judgment:

> On 30th May 2018, the Special Criminal Court delivered its judgment, wherein it convicted the applicant of an offence contrary to s.21 of the 1939 Act, in particular membership of a prescribed organisation, in particular membership of the organisation styling itself Óglaigh na hÉireann/IRA. The court reached its verdict on the basis of four strands of evidence being: the belief evidence given by C/Superintendent Maguire given pursuant to the Offences Against the State (Amendment) Act 1972; evidence of association between the applicant and members of the IRA; conduct evidence in relation to his actions on 12th and 13th July, 2017 and inferences from his failure to respond to material questions put to him after the invocation of certain statutory inference provisions, in particular the provisions of s.2 of the Offences Against the State (Amendment) Act, 1998. Certain inferences were also drawn from his refusal to answer certain questions which had been put to him pursuant to s.19 of the Criminal Justice Act 1984. On conviction the applicant was sentenced by the Special Criminal Court to 4½ years imprisonment.

9. The Chief Superintendent who extended the initial 24-hour detention of the applicant was Chief Superintendent Thomas Maguire. Some emphasis is placed on the fact that he also gave evidence, as he was legally empowered so to do, of his belief that Kevin Braney was at the relevant time a member of the self-styled Irish Republican Army.

10. Thus, there were four strands to the conviction: the opinion of the police officer at that rank, association with other members of the illegal organisation, conduct as to the threats, and inferences from his failure to answer questions material to the charge; such inferences being made by legislative authority under s 2 of the Offences Against the State (Amendment) Act 1998.

11. Kevin Braney contends that the inference from failure to answer questions evidence was drawn from the period after the detention was extended. Therefore, he argues that some of the evidence upon which he was convicted was inadmissible at trial, supposing that the extension from the initial 24 hour period following arrest had been invalidly extended by Chief Superintendent Maguire. Other aspects of the evidence, including the opinion evidence, the association evidence and the conduct on the relevant date would remain untouched.

Offences Against the State Act

12. The Offences Against the State Act 1939, the impugned legislation, was specifically designed as an anti-terrorism measure. A brief reference to the history of the Offences Against the State Act 1939 should be made. In January 1939, the self-styled IRA/Óglaigh na hÉireann called on Great Britain to withdraw from the six counties of Northern Ireland and threatened action should such a declaration not be made within four days. When the demand evoked no response, a terror campaign was unleashed in England. This caused, pursuant to the so-called 'S-Plan' of bombing organised by the unlawful organisation's 'Director of Chemicals', explosions that killed a fish porter in Manchester, another fatality in a left-luggage facility at King's Cross railway station in London, and the deaths of five people in Coventry, ranging from a schoolboy to a man in his eighties. In all there were about 120 terror explosions that year; Robert Fisk, *In Time of War: Ireland, Ulster and the price of neutrality 1939-1940* (London, 1983) 72-75. The Bill of February 1939, that became the 1939 Act, outlawed actions subversive of the exclusive authority of the State, including usurping or obstructing the functions of government, interfering with the military or public service, carrying out unauthorised military exercises, setting up secret societies within the military or public service, distributing or printing seditious materials, unlawfully administering oaths and proscribing certain organisations and making membership of same an offence. Explosives offences and firearms offences were already on the statute book and these were scheduled to the Act so that the powers of arrest and detention set out in s 30 would apply to an extended range of terrorist type crimes. The Special Criminal Court was also set up to judge scheduled cases by the written verdict of three judges, subject to appeal in the ordinary way, as in other criminal cases, it having been adjudged pursuant to Article 38 of the Constitution that "the ordinary courts" were "inadequate to secure the effective administration of justice, and the preservation of public peace and order". The Special Criminal Court operates precisely the same fundamental rules of evidence and procedural safeguards as all other courts.

13. The originally scheduled offences, enabling arrest under s 30 and trial in the Special Criminal Court did not include, and have since not encompassed, such crimes as sexual violence, drugs, homicide, theft and fraud, but centred around explosives and firearms offences and those crimes created by the 1939 legislation itself. The original Act has been much amended; twice in 1940, in 1941, in 1942, in 1972, in 1985, and in 1998: the latter after the terrorist bombing with multiple fatalities in Omagh on 15 August of that year and introducing novel offences of directing or training or possession of articles, perhaps not already covered by criminal law inchoate offence theory. The schedule has been amended to remove malicious damage offences and to keep up with the changes to the legislation itself. The currently scheduled offences are set out in Appendix II to this judgment.

Universal detention safeguards

14. Arrest expressly for the purpose of questioning was possible up to 1984 only under s 30 of the Offences Against the State Act 1939. Prior to that time, there was no power for the detention of a person for the purposes of questioning or taking samples, for instance blood or DNA or hair samples; *People (Director of Public Prosecutions) v O'Loughlin* [1979] IR 85. Since, however, the Judges' Rules of 1912 required the administration of a caution as to the right to silence where a suspect had been arrested and, since such a caution was also required where a police officer had decided to charge a suspect with an offence, despite rule 1 stating that nothing prevented a police officer making enquiries of anyone, it is clear that as between arrest and bringing the suspect before a judge for charge, there was an interval. That could be used to question the suspect, but this power was informal and depended very much on the time of arrest and the gap to the next sitting of the court which could reasonably be accessed. At common law, arrest was considered as the first formal step in the judicial stage of the criminal process; *People v Shaw* [1982] IR 1, 29. In that case, Walsh J made it clear that: "No person may be arrested (with or without warrant) for the purpose of interrogation or the securing of evidence from that person." This extended to arrest for the purpose of an identification parade, formal or not; *The People (Director of Public Prosecutions) v Donaghy* [1988] 3 Frewen 138.

15. To supplement these limited powers, the Criminal Justice Act 1984 introduced arrest for questioning and other investigations, including: identification parades, sampling with consent or by statutory authority and questioning. This was for up to 6 hours, extendable by a senior officer to 12 hours, including overnight when questioning normally must be suspended. The nature of the change meant that the legislation incorporates safeguards to ensure the proper treatment of persons in custody. All such safeguards apply to arrested persons, whether arrested under the 1939 Act or the 1984 Act. The exception to this is that once a person is arrested under s 30 it is not necessary to check that arrest and detention with the Garda in charge of custody who under the 1984 Act must concur that the arrest and detention are reasonably necessary for the investigation of the offence. The general regulations, which have been amended several times to require, among other safeguards, interviews recorded on video, apply to all forms of arrest and detention for investigation, including s 30. These are SI No 119/1987, The Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987. An overview of the requirements applying both to persons arrested under s 30 and other arrests necessarily follows.

16. On arrest, a suspect is given a form which outlines his or her rights to a lawyer, to medical assistance, to proper treatment and to contact with family. All custody, including

s 30 detention, is overseen by a Garda who is designated "member in charge" of the station. That person must open a custody record and must periodically check on the detainee to ensure proper treatment, the provision of meals, rest and pauses between interviews, sleep at night, legal assistance and if necessary any medical checks arising from any condition such as asthma or other pre-arrest issues. If any issue arises at trial, the custody officer may be called as a witness. Where under s 30, a detention is extended from 24 hours to 48 hours by a senior officer, this must be noted in the custody record as must every incident as to complaints, visits, facilities, meals, sleep, hours of questioning, any move from cell to interview room, and attendance by a solicitor. Article 7(4) of the Regulations provides:

> Where a direction has been given under section 30 of the Offences against the State Act, 1939 (No. 13 of 1939), that a person be detained for a further period not exceeding twenty-four hours, the fact that the direction was given, the date and time when it was given and the name and rank of the officer who gave it shall be recorded.

17. Essentially, and solely, the difference between a s 30 arrest under the 1939 Act and an arrest under s 4 of the 1984 Act is that additional opinion, which is beyond the opinion of the arresting officer, that the detention is necessary for the investigation of the offence for which the person was arrested. Hence, Article 7(2) of the 1987 Regulations provides:

> In the case of a person who is being detained in a station pursuant to section 4 of the Act the member in charge at the time of the person's arrival at the station shall, when authorising the detention, enter in the custody record and sign the following statement:
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> "I have reasonable grounds for believing that the detention of (insert here the name of the person detained) is necessary for the proper investigation of the offence(s) in respect of which he/she has been arrested."

18. It requires emphasis that no one, either under s 30 or more generally for less specific offences, is entitled to arrest anyone without having reasonable grounds of suspicion as to their involvement in an offence or to continue with an arrest where during the course of investigation that suspicion dissipates. While this is cast in statutory form in relation to general arrest under the 1984 Act, the principle of minimal and justifiable interference with liberty in the form of arrest prevails throughout the law and is certainly applicable to s 30 arrests. Section 4(4) of the 1984 Act is, in this respect, declaratory of general law:

> If at any time during the detention of a person pursuant to this section there are no longer reasonable grounds for suspecting that he has committed an offence to which this section applies, he shall be released from custody forthwith unless his detention is authorised apart from this Act.

19. This is a general and particular requirement which extends not only to arrests under the 1984 Act but to arrests in general since it emerges from the general executive and administrative law principle of actions only being lawful if not unreasonable. An authority is an immigration case; *In the matter of Article 26 of the Constitution and ss. 5, 10 of the Illegal Immigrants(Trafficking) Bill 1999* [2000] 2 IR 360. That case concerned arrest for deportation, among other matters, and the concern was as to the change in circumstances by the discovery of new facts whereby what had at its inception been a

reasonable detention might become no longer tenable. Reasonableness is clearly required throughout and this it is set out in clear terms at page 410 by Keane CJ where he said that:

> the principles set out by this court in *East Donegal Co-Operative v. Attorney General* [1970] I.R. 317, must be applied to the statutory powers of detention. It does not follow that because the section permits of detention for up to eight weeks in the aggregate, the proposed deportee may necessarily be detained for that period if circumstances change or new facts come to light which indicate that such detention is unnecessary.

20. Therefore, even where the initial detention is lawful it may become unlawful because new facts come to light which make the continuation of a detention no longer based on reasonable suspicion. Should that new fact be such as to dissolve the reasonable suspicion in the mind of the arresting officer, the detention must cease.

Suspicion must be reasonable

21. An arrested person is entitled to know why that infringement of the general right to be at liberty is being effected; *Re Ó Laighléis* [1960] IR 93. Our system does not support undermining the suspect through secrecy as to what is under investigation; *Farrelly v Devally* [1998] 4 IR 76. Nor does the law permit indeterminate detention but instead all suspects will receive legal advice and will know through the officer in charge of the Garda station what the maximum period of arrest for investigation is. No arrest of any kind can take place unless there is a reasonable suspicion in the mind of the arresting officer that a criminal offence, one categorised in law as enabling arrest, has been committed and that the person to be arrested has committed that offence. Circularity tends to undermine any attempt to define what a reasonable suspicion is since it constitutes a considered decision to analyse grounds of suspicion and to test whether that on which the suspicion is based is more than a hunch but can be justified by reason. A hunch can lead to the consideration of circumstances and facts that ground a reasonable suspicion but a mere hunch without factors which would lead an ordinary and reasonable person to suspect the involvement of the person to be arrested is far from sufficient. Individual decisions have emphasised the necessity for s 30 to be construed so as to render unlawful any purported arrest under that power unless suspicion based on reasonable grounds is demonstrated. Thus in *The People (DPP) v Quilligan & O'Reilly* [1986] IR 495 at 507, 514-515, 520-21 this court emphasised that to found a valid arrest the suspicion of the arresting officer must be held in good faith and be "not unreasonable"; and see *The People (DPP) v Tyndall* [2006] 1 IR 593, Denham J at 599-602. Citing *Quilligan & O'Reilly*, she emphatically ruled out any arrest unless coming within the scope of and for the powers conferred by legislation or common law and as being based on a reasonable suspicion:

> Suspicion is not defined in the Act. It should be bona fide and not irrational. It is a fact to be proved by direct evidence, or it may be inferred from the circumstances. It is an essential proof. The circumstances of this case were not such as to enable a court to infer the suspicion. The learned trial judge was not entitled to conclude that the circumstances were sufficient to compel an inference that the necessary suspicion existed. If the fact of an arrest by a detective sergeant, who was an investigating officer, was sufficient from which to infer the required suspicion of the member of the Gárda Síochána, when the

> arrest is only valid if the member has the necessary suspicion, it would be to apply reasoning which is circular and flawed. There must be circumstances other than the arrest itself by a member of the Gárda Síochána from which the suspicion of the arresting member may be inferred. The clear words of s.30 require that the arresting member of the Gárda Síochána have a suspicion. Evidence of that suspicion may be given either by direct evidence or by indirect evidence.

22. This requirement of reasonableness is grounded in general administrative law, the presumption that no administrative or executive body could act so as to fly in the face of reason and common sense, thereby exceeding the bounds of conferred jurisdiction, becoming crystallised over time into a requirement of acting in accordance with reason, and on reasonable grounds, in all actions potentially infringing the rights of citizens. This is the general test cited, for example, in *Walsh on Criminal Procedure* (2nd edition, Roundhall, 2016) at 4.77 where, commenting on what is "not unreasonable", it is stated:

> Presumably, it does not mean that the suspicion must be an objectively reasonable one, otherwise the learned judge would surely have stated quite simply that it must be a reasonable suspicion or a suspicion based on reasonable grounds. At the same time it clearly signifies the need for something more than a mere honest suspicion in the mind of the arresting officer. Hogan and Walker [- Political Violence and The Law in Ireland, 1989, 203-204] suggest that it signifies the administrative law test of reasonableness that is generally applied in a judicial review of the exercise of discretionary powers. In effect, the judge would be looking for the existence of facts upon which a police officer could reasonably have formed a suspicion that the person to be arrested had committed the offence in question. It may be that the judge himself or even another police officer might not necessarily have formed the same suspicion. That, however, would not matter so long as the facts were such that it would not have been unreasonable for the police officer concerned to have formed the suspicion. Hogan and Walker go on to suggest that the difference between this test and that of "reasonable suspicion" which applies to most arrest powers may not be very great as the Irish courts now insist on the existence of objective evidence to justify the exercise of discretionary powers. In practice, the Irish courts have repeatedly applied an objective standard for the suspicion in s.30 without yet feeling the need to determine whether that is the conventional objective standard or some modified version.

23. A reasonable suspicion is not concerned with what evidence might be admitted or excluded at trial, save that the ordinary principle of relevance in terms of one fact proving, tending to prove, or being capable of inferring the existence of another applies. Rather, it is capable of being founded on hearsay, circumstance, inference, record and conduct, the proof of a fact other than by direct testimony and the prior convictions of an accused generally being inadmissible at trial; *DPP (Walsh) v Cash* [2007] IEHC 108. In *CRH plc v Competition and Consumer Protection Commission* [2018] 1 IR 521 at paragraph 236, in the context of search and seizure of emails from a computer, but analysing the concept of reasonable suspicion as it applies in arrest, extension of detention and search warrant powers, Charleton J offered the following analysis of the relevant authorities:

> In terms of the ordinary construction of the powers of search, a warrant is issuable by the District Court on reasonable suspicion that "evidence of, or

relating to" an offence under the 2002 Act "is to be found in any place"; thereafter the officers of the Commission have a month to "enter and search the place" and to "exercise all or any of the powers conferred on an authorised officer under this section." A reasonable suspicion is one founded on some ground which, if subsequently challenged, will show that the person arresting, issuing the warrant or extending the detention of the accused acted reasonably; see Glanville Williams, "Arrest for Felony at Common Law" [1954] Crim LR 408. A reasonable suspicion can be based on hearsay evidence or the discovery of a false alibi; *Hussein v Chong Fook Kam* [1970] AC 942: or on information offered by an informer who is adjudged reliable; *Lister v Perryman* [1870] LR 4 HL 521, *Isaacs v Brand* (1817) 2 Stark 167, *The People (DPP) v Reddan* [1995] 3 IR 560. A suspicion communicated to a garda by a superior can be sufficient to constitute a reasonable suspicion, as may a suspicion communicated from one official to another, which is enough to leave that other individual in a state of reasonably suspecting; *The People (DPP) v McCaffrey* [1986] ILRM 687. The fact that a suspect is later acquitted does not mean that there was not a reasonable suspicion to ground either an arrest or a search. It is accepted by the European Court of Human Rights that "the existence of a reasonable suspicion is to be assessed at the time of issuing the search warrant"; *Robathin v Austria* (App. No. 30457/06) (Unreported, European Court of Human Rights, 3rd October 2012) at para. 36. Having information before a judge of the District Court whereby he or she may reasonably suspect the potential presence of information on a premises founds the warrant. The standard being applied here is such as might be familiar from civil or criminal practice. But issuing a search warrant is not to be confounded with any analogy with the criminal trial process. That is not the task. Facts are not being found: facts are being gathered. It necessarily follows that what is involved is an exercise in the pursuit of what is potential, essentially an exercise which may yield no information or limited information. It is of the nature of a criminal enquiry that a warrant may authorise an intrusion into someone's privacy to little or no effect. This is of the nature of what is required in the course of information gathering and a negative result does not upset the validity of what was done if, after the event, information that may serve towards displacing the presumption of innocence happens not to have been gleaned. The power to issue the search warrant, therefore, does not in this instance inform the nature of the powers that may be exercised pursuant to it.

24. Most fundamental to the protection of all arrested persons is the floor of rights which provides for clarity as to reasons for arrest, no arrest without reasonable suspicion and that once a suspicion dissipates while liberty is temporarily suspended by reason of arrest, through for instance the suspect demonstrating a sound factual basis or by other independent enquiry, the liberty of the suspect must be restored. This floor of rights applies as stringently to s 30 arrest under the 1939 Act as to arrest under the general power under the 1984 Act and to other myriad powers of arrest at common law and by various disparate statutes. This constitutes a solid floor upon which other entitlements or other statutory mechanisms for the administration of arrest have been built, among other legislation by the 1984 Act. The fact, however, that other methods or different safeguards inform arrests and detentions different to the very serious matters targeted by the 1939 Act does not mean that constitutional infirmity or invidious discrimination attach to the earlier specialised legislation. In itself, criminal law and criminal procedure are made up of a patchwork of measures: a new menace presents itself, people being stabbed with syringes or harassment or bullying through social media, the law responds

and a penalty is set. This does not mean that potential penalties are to be scrutinised for their conformity with earlier legislation, for instance as to wounding or as to besetting, or that the necessarily individual and event-based response to the development of crime is to become homogenised. Ultimately, the safeguard which presents to all of this is the duty of the courts to find and impose a penalty, just as in tort law, the existing remedies are to be adapted to new situations. In the award of damages or injunctive relief, or in settling on an appropriate punishment, justice is the guide and constitutional infirmity does not arise due to piecemeal responses unless it excludes in its entirety, and through any reasonable interpretation of legislation, the possibility that the judicial arm of government may not arrive at a just result.

25. In that regard, it is argued on behalf of Kevin Braney that false arrest is not amenable to remedy. This is not so since false imprisonment is a tort entitling the victim to an award of damages. On his contention, this is insufficient since a person whose arrest continues unjustifiably, or in respect of whom the detention should never have taken place since no reasonable suspicion ever existed, has no remedy. This is not so.

Article 40.4

26. The guarantees in the Constitution are not rhetorical or lyrical but real. Every phrase in the Constitution has an imperative meaning. Article 40.4.1° provides that only through a valid law may persons be deprived of their liberty. In so declaring, a remedy is established in Article 40.4 whereby any person, not the prisoner or detainee solely or that person's lawyer, but a member of his or her family or any interested person, may, without formality, apply to the High Court for an enquiry as to whether that person is or is not being lawfully detained:

> 1° No citizen shall be deprived of his personal liberty save in accordance with law.
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> 2° Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law.
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> 3° Where the body of a person alleged to be unlawfully detained is produced before the High Court in pursuance of an order in that behalf made under this section and that Court is satisfied that such person is being detained in accordance with a law but that such law is invalid having regard to the provisions of this Constitution, the High Court shall refer the question of the validity of such law to the Court of Appeal by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on

> such bail and subject to such conditions as the High Court shall fix until the Court of Appeal has determined the question so referred to it.
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> 4° The High Court before which the body of a person alleged to be unlawfully detained is to be produced in pursuance of an order in that behalf made under this section shall, if the President of the High Court or, if he is not available, the senior judge of that Court who is available so directs in respect of any particular case, consist of three judges and shall, in every other case, consist of one judge only.
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> 5° Nothing in this section, however, shall be invoked to prohibit, control, or interfere with any act of the Defence Forces during the existence of a state of war or armed rebellion.
>
> 6° Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.

27. In other countries, this procedural recourse to the courts in assertion of the right to liberty is called the right to habeas corpus. Such cases proceed on a matter of urgency and without the need for the filing of documents; a simple oral application to any judge of the High Court suffices. There are no procedures since the constitutional imperative of liberty transcends all rules of court. There is a solemn duty on the High Court to make that enquiry and to pronounce under Article 40.4.3° if that person "is being detained in accordance with law" and, under Article 40.4.2° in all cases, to "order the release of such person from such detention unless satisfied that he is being detained in accordance with law." Further see Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution*, (5th edition, Bloomsbury Professional, Dublin, 2018), at [7.4.366]. This is not an empty formula, as is contended for by Kevin Braney. In *State (Trimbole) v The Governor of Mountjoy Prison* [1985]I.R. 550 a suspect wanted in Australia appeared in Ireland but in the absence of an extradition treaty or arrangement between the two countries. The applicant was arrested on suspicion of possessing firearms. On an application under the ancient remedy given constitutional form in Article 40.4, the High Court rejected the explanation for the arrest holding instead it to be a device to enable the time for such arrangements to be made. Under prior scheduling to the 1939 Act, enabling arrest under s 30, malicious damage was scheduled.

28. Other reported cases are informative. In *Dempsey v Member in charge of Tallaght Garda Station and others* [2011] IEHC 257 the applicant's solicitor had made enquiries of the police and did not receive a satisfactory answer as to the basis for his arrest. The applicant was physically produced to the High Court where the State informed the court that it was not proposed to detain the applicant in custody any further. In *Finnegan v Member in Charge (Santry Garda Station)* [2006] 4 IR 62 an inquiry was granted under Article 40.4 where the Applicant had his detention extended under s 30 by a District Court Judge in circumstances where at the time the order of extension was made the initial 48 hours of detention had expired by approximately 25 minutes. The applicant was released. In *Moloney v Member in Charge of Terenure Garda Station* [2002] 2 ILRM 149 the applicant was arrested under s 30 for firearms offences. His detention was extended for a period of 24 hours. During the detention he was questioned in respect of the offence of murder in connection with which he had two months previously been arrested under s 4 of the Criminal Justice Act 1984. The applicant brought an application under Article 40.4 of the

Constitution of Ireland. The court was satisfied, on the evidence, that the arrest of the Applicant was *bona fide*. There was an issue raised as to whether the arrest was in fact a re-arrest in prohibited circumstances. The application was dismissed. Where the crime to be addressed, however, was in reality not a scheduled offence, and murder was not and is not a scheduled offence, but damage to a weapon used to kill, or cattle maiming, is used as a colourable device to enable arrest for what is in reality murder, that renders any arrest unlawful and triggers the appropriate declaration under Article 40.4; *DPP v Howley* [1989] ILRM 629. There this Court examined circumstances where the accused had been arrested for the scheduled offence of malicious damage offence of maiming cattle, but was in reality was being arrested for a murder that had taken place some months later. This device was condemned as unlawful, Walsh J stating at 634:

> Therefore what the cases established is that when an arrest for a scheduled offence effected under s. 30 of the Offences Against the State Act 1939, not only must the arresting Garda have the necessary reasonable suspicion concerning the particular offence in question, but that in fact there must be a genuine desire and intent to pursue the investigation of that offence or suspected offence and that the arrest must not simply be a colourable device to enable a person to be detained in pursuit of some other alleged offence.

29. Throughout any detention, the accused has a right to legal advice, including while being questioned. In *The People (DPP) v Gormley and White* [2014] 2 IR 591, the Supreme Court held that basic fairness required that an interview should not take place when a request for a lawyer has been made and before that lawyer is available. No interview of the suspect can be carried out save where that person has the benefit of having spoken to a lawyer; *The People (DPP) v Doyle* [2018] IR 1. Pursuant to this State's obligations to the European Convention on Human Rights, during interview, unless a suspect decides to waive that entitlement, a lawyer will be present; Application 51979/17 *Doyle v Ireland* judgment of 23 May 2019. Thus, at all times during interview there will be a lawyer present for the detained person. Upon arrival in custody, a printed notice in several languages is given to the arrestee detailing rights to legal advice and all detainees know that a custody record detailing every significant event chronologically will be kept. As the Europe Court of Human Rights emphasised in its analysis of Irish law, the safeguards around detention are marked by a requirement of fairness, that interviews be video recorded, that there be no unlawful inducement or any form of intimidation and that legal assistance operate as a counterbalance to the deprivation of liberty. Upon analysis of the particular manner in which fairness dominates the potential for the taking of any confession statement and the safeguards surrounding custody, that court held:

> 100. In conclusion, the Court recalls that its role is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply with the requirements of a fair trial, having regard to the specific circumstances of each accused (see Beuze, cited above, § 148.).
>
> 101. In the present case it is important to stress that while a majority of the Supreme Court, which engaged extensively with the Court's case-law on Article 6, was correct in concluding that where there have been procedural defects at pre-trial stage, the primary concern of the domestic courts at trial stage and on appeal must be the overall fairness of the criminal proceedings, it failed to

> recognize that the right of an accused to have access to a lawyer extended to having that lawyer physically present during police interviews.
>
> 102. The Court finds that, in the circumstances of the present case, notwithstanding the very strict scrutiny that must be applied where, as here, there are no compelling reasons to justify a restriction of the accused's right of access to a lawyer, when considered as a whole the overall fairness of the trial was not irretrievably prejudiced.
>
> 103. The foregoing considerations are sufficient to enable the Court to conclude that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

30. It must be recognised that these strictures as to legal advice being a central component of detention operates as a safeguard to the right to liberty. Thus, legal presence enables, if necessary, any application for scrutiny to the High Court. It is important to note also that, following the implementation of the Legal Advice Revised Scheme, someone detained under s 30 of the 1939 Act is entitled to legal aid to cover the costs of a solicitor attending an interview or interrogation parade.

Development of detention powers

31. While reference has been made to the absence of formal powers for detention for questioning from the independence of the State in 1922 up to the passing of the 1939 Act, when detention for a limited time and for a particular purpose related to offences scheduled under that legislation, confession statements were still possible but a formalisation of time periods was required. Depending on the availability of courts and a proximate sitting, the time of arrest and the willingness of lawyers to offer advice, this system lacked certainty of administration that should characterise a legal system. Hence, the reforms introduced by the 1984 Act. One of the purposes of this was to rationalise for arrest purposes the common law distinction as between crimes that were felonies and others which were classified as misdemeanours. Due to the development of criminal law, rationality could be viewed as being challenged where fraud was generally classified as a misdemeanour, but could be massive in impact, as in a major bank fraud, while theft was within the more serious classification of felony, even though it might be quite minor, as in shoplifting. Arrest could take place by a citizen on another citizen where a felony had in fact been committed, as a certain fact and not merely that this was reasonably suspected, and the citizen reasonably suspected the arrestee of the crime. An example was shoplifting but the arrested person had to be handed over to a police officer as soon as practicable. Where fraud was involved, because of the classification, no such arrest was possible. A police officer could arrest where the officer reasonably suspected the commission of a felony and that the suspect had committed such an offence. Misdemeanour powers of arrest were statutory and had developed piecemeal. In addition arrest for breach of the peace was and is possible pursuant to the common law duty of police officers to keep the peace; *Thorpe v DPP* [2007] 1 IR 502, *DPP v O Brien* [2020] IEHC 110. Arrest powers were rationalised in addition to general powers of detention by the 1984 Act by making serious crimes, ones carrying 5 years or more imprisonment, arrestable as if these were felonies, the abolition of the felony-misdemeanour distinction and the retention of existing arrest powers for lesser offences, mostly resulting from disparate statutory powers.

32. Even countries based on codes will experience the development of law whereby strictures applied to certain crimes are not found with others or whereby absolute and certain logic does not prevail from amendment to amendment of existing law or through the introduction of new laws. This does not demonstrate, necessarily, infirmity from the aspect of the protection of rights. As has been mentioned, as new situations come to light, legislatures will respond as best they can to the changes which social order, as the object of law declared in the Preamble to the Constitution, requires. Legal rules in a common law system are the products of experience; the law evolves in response to novel situations and is refined on the basis of what works best. The nature of the adversarial system means that, when courts adjudicate matters and contribute to the development of the common law, the legal rules enunciated are necessarily tailored to the arguments advanced before them and are limited in their scope to the facts of the case. The result is that different rules develop in response to different, although perhaps similar, legal questions. Similarly, the legislature responds to situations as they arise and tailor their approach to the particular offence with which they are dealing. This does not mean that there are inconsistencies in the legal system but it does mean that different offences are treated differently as a result of the policy choices underlying the relevant statutes. All systems, whether they be based on the common or civil law, differentiate in this way between different offences; coherence within a legal system does not require absolute uniformity and neither does ant principle of fairness. Not every situation calls for an identical number of hours of detention and the strictures needed in dealing with very serious crimes such as sampling or searches need not be applied across the board. Police officers cannot just take it as so if a suspect confesses to a terrorist offence. Perhaps the person was set up by members of a gang, or designated as the fall-guy or is suggestible? Everything requires officers to go out and seek cross-supportive facts or note the absence of same. This takes time. The person best placed to ensure a fair appraisal is the senior officer tasked with overseeing the extension of detention. That officer knows more than anyone else and if there is a wrong analysis, remedies under the Constitution in support of liberty are available. At a minimum, the detained suspect has legal assistance in custody.

33. As the realisation of the dangers of organised crime resonated in the wake of headline incidents of perpetration, the legislature has responded. And this is surely an experience common to all countries. The criminogenic effect of drug abuse is an example of how it may be necessary to construct an individual response to a drastic social situation. Hence, there are a myriad of responses. This table gives an accurate set of legislative data as to the kind of crimes which the law has responded to, the time for detention where a suspect is so characterised, how detention may be extended, the limits thereof and when a judicial authority appointed under the Constitution is required to authorise an extension of detention:

Act	**Authorisation**						
	Member in charge	**Superintendent**	**Chief Superintendent**	**District Court Judge**	**District or Circuit Court Judge**	**District or Circuit Court Judge**	**Total**
Section 4 of the Criminal Justice Act, 1984	6 hours	+ 6 hours	+ 12 hours				24 hours

Section 30 of the Offences Against the State Act, 1939	24 hours (Initial detention not authorised by the Member in Charge)		+ 24 hours	+ 24 hours			72 hours
Section 2 of the Criminal Justice (Drug Trafficking) Act, 1996	6 hours	18 hours	+24 hours		+ 72 hours	+ 48 hours	168 hours
Section 50 of the Criminal Justice Act, 2007	6 hours	+ 18 hours	+ 24 hours		+ 72 hours	+ 48 hours	168 hours
Section 42 of the Criminal Justice Act, 1999	6 hours	+ 6 hours	+ 12 hours				24 hours
Sections 16 & 17 of the Criminal Procedure Act, 2010	6 hours	+ 6 hours	+ 12 hours				24 hours

34. As is apparent, particular safeguards as to the rank of officer, that individual's necessarily long experience and particular training, are brought into the administration of custody as times for detention may extend. This demonstrates the care whereby the floor of rights is maintained while differing legal responses operate on that foundation. Hence, both s 30 of the 1939 Act and the general arrest powers under s 4 of the 1984 Act differ, and the nature of the general wrongs in the latter differ from the scheduled offences under the former. With the near total repeal of the Malicious Damage Act 1861, and with the passing of the Criminal Damage Act 1991, the scheduled offences to the 1939 Act are now even more clearly focused on combatting terrorism and organised crime. The provisions pertaining to arrest and detention in the statute are therefore tailored to combatting these particular offences, which necessitates a difference in approach from that under the 1984 Act. Prior to the 1991 Act it might be argued that break ins to premises or damage to property in the course of a homicide might enable s 30 as an arrest power but that can no longer be claimed. Moving the focus of this police instrument to trafficking and organised crime offences, more time for investigation may be needed and this is hardly surprising in the context of the culture of *omerta* which characterises criminal gang discipline. That does not mean the denial of rights since that floor of rights guaranteed by the Constitution still prevails.

Equality

35. Central to the argument made by Kevin Braney is that the extension of the detention of an arrested suspect is the same as the issue of a search warrant. If that is so, that contention runs, then the arrest of a suspect, involving as it does the temporary denial of liberty, but on a reasonable and considered basis, should somehow be equated with detention itself, with the extension of that detention and with search warrant powers. That is not so. While the doctrine of equality mandated by Article 40.1 of the Constitution seems held between polarities of those aspects of the human personality which must not be discriminated against and a wider doctrine apparently requiring all

similar situations to be treated equally, the express wording focusing on the attributes of shared humanity has not been abrogated by referendum of the people: "All citizens shall, as human persons, be held equal before the law." Hence, a reading of the case law, while emphasising human personality as a touchstone, has moved outside the confinement of personal attributes and into a search for comparators and why apparently equal situations do not call for uniform treatment. There is no imperative discoverable from any case decided by this Court whereby all situations must be resolved in law into homogeneity. One situation of non-homogeneity may be unconstitutional unless treatment is underpinned by practical reasons that do not seek to discriminate on an unfair basis that draws from prejudice or the differentiation of people on the basis of their essential attributes. As the criminal law has developed over time, and by experience of what is needed to combat distinctly different wrongs against society, differing crimes have required varying powers of investigation and while the overlapping sets of circumstances are not always entirely uniform, there is a reasoned basis underpinning those different powers which the legislature has ascribed to the police in the pursuit of attaining true social order. None of these differences set out to discriminate as between people: rather the variations in police powers are attributable to three factors: the nature of the threat to society; the need to circumscribe the temporary deprivation of liberty and privacy with safeguards; and the imperative to adequately enable an investigation towards the exclusion of the innocent and the safeguarding of society from the infinitely variable and seldom less than insidious forms of criminal activity.

36. By reason of arrest, in our system, and in most legal systems, a person is detained. In respect of other offences which are not scheduled under the 1939 Act, there is an extension possible in that detention for investigation, one mandated by a police officer of high rank, first of all, and up to 48 hours, but no further under a s 30 arrest. At the 48 hour point, s 30 detention stops. But under other forms of arrest 48 hours can be extended to up to a week made by a judge sitting in a court and hearing appropriate evidence to justify such further deprivation of liberty, one increasing the detention by 120 hours. The proofs enabling such an extension are the same as for extension by a police officer of high rank; the reasonableness of the suspicion linking the accused to the crime and the necessity for more time to enable the investigation to be thorough. Section 30 arrests stop at 48 hours and do not extend to the kind of longer-term detention for a week, 168 hours, which as the foregoing table demonstrates, applies to some very serious forms of crime outside of the offences scheduled under the 1939 Act. Search, in truth, is not an analogous police power to detention. Still, there should be a floor of rights to ensure the security of rights. But, as between those whose homes or premises are searched and those arrested for investigation, those rights are different. Furthermore, the patchwork of legislative responses in police powers cannot be expected to exactly match and nor does any principle of fundamental law require these democratic answers to crime to homogeneously coalesce.

37. Clearly, there should be safeguards for invasions of the private space, most especially that of the space where people dwell. Article 40.5 of the Constitution provides: "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law." There has to be a fundamental standard of legality. Again, the standard has to be that of reasonableness because lawful action intruding on rights to liberty implies not only compliance with the letter of the law but with justifiable human reasoning. No one can search based on a mere intuition. For legal validity, any such hunch has to be backed up by the use of rationality. Since what is involved is an administrative action affecting existing rights, and since under s 3 of the European Convention on Human Rights Act

2003, such actions are required to be Convention compliant, there is no sense in which merely intuitive excuses for an invalid search can be dressed up as reasons. Fundamentally, such an intrusion cannot be on a basis lacking reason, some excuse that flies in the face of fundamental reason and common sense offends the reasonableness standard. Invoking *Damache v DPP & Others* [2012] IESC 11, [2012] 2 IR 266, and correctly stating the position in our law that, apart from in an emergency, only a judge or a high-ranking police officer from outside the investigation may issue a search warrant, it is argued that only a judge or a high-ranking police officer from outside the investigation can extend the initial 24 hours of detention under s 30 by a further 24 hours. In this context, it is to be remembered that other forms of detention outside of a s 30 arrest is to be extended by a police officer: thereby a 6 hour detention can become a 12 hour detention upon arrest and so on in accordance with the table above.

38. A reasoned analysis of the nature of search demonstrates the difference between an intrusion into a physically private space and the nature of an ongoing detention for questioning or sampling. In search, there is no entitlement for a lawyer to be present; *CRH plc v Competition and Consumer Protection Authority*. In the aftermath of a search, in the context of a criminal trial, or through a civil action for alleged trespass, such an intrusion can be questioned. But, of the nature of a search, the protection of rights needs to be assured in advance; that there are reasonable grounds whereby, to use an oft repeated statutory formula found invariably in dispirit criminal legislation, evidence in relation to the commission of an offence may be found, at the location specified in the warrant. In itself, the warrant is not shorn of temporal connection. Since circumstances can change, thus a search warrant requires to be executed within a time limit that is invariably set by statute. It is not a case of the authorities arming themselves with a search warrant and holding it merely as a speculative weapon over an extended period; rather it is there to be used. According to the Fourth Amendment of the Constitution of the United States of America, "the people" have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and where no warrant may issue "but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized". This may be reflected in the fundamental law of several European countries. In our Constitution, it is Article 40.5 but the protection against unreasonable search is a product of the common law.

39. Article 40.5 expresses a sensible approach to the protection of the privacy of the home, or in the original text "ionad cónaithe" whereby there is a protection by law frontloaded before an authorised intrusion. Many statutes distinguish, in that regard, between a requirement for judicial authorisation where a home is searched and where the search is of business premises. Making no comment on this, it is apparent that the *Damache* decision concerned the home and the need for forcible entry to have particular protection through independence of authorisation. An extended quote from that case and the judgment of Denham CJ illustrates this:

> 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.

48. Analysis and application of such fundamental principles may be illustrated from cases in other jurisdictions.

49. In *Camenzind v. Switzerland* (App. No. 2135/93) (1999) 28 EHRR 458 at 476 and 477 it was stated:-

> "46. In the present case the purpose of the search was to seize an unauthorised cordless telephone that Camenzind was suspected of having used contrary to section 42 of the Federal Act of 1922 regulating telegraph and telephone communications. Admittedly, the authorities already had some evidence of the offence as the radio communications surveillance unit of the Head Office of the *PTT* had recorded the applicant's conversation and Camenzind had admitted using the telephone. Nevertheless, the Court accepts that the competent authorities were justified in thinking that the seizure of the *corpus delicti* – and, consequently, the search – were necessary to provide evidence of the relevant offence.
> With regard to the safeguards provided by Swiss law, the Court notes that under the Federal Administrative Criminal Law Act of 22 March 1974, as amended, a search may, subject to exceptions, only be effected under a written warrant issued by a limited number of designated senior public servants and carried out by officials specially trained for the purpose; they each have an obligation to stand down if circumstances exist which could affect their impartiality. Searches can only be carried out in 'dwellings and other premises … if it is likely that a suspect is in hiding there or if objects or valuables liable to seizure or evidence of the commission of an offence are to be found there'; they cannot be conducted on Sundays, public holidays or at night 'except in important cases or where there is imminent danger'. At the beginning of a search the investigating official must produce evidence of identity and inform the occupier of the premises of the purpose of the search. That person or, if he is absent, a relative or a member of the household must be asked to attend. In principle, there will also be a public officer present to ensure that '[the search] does not deviate from its purpose'. A record of the search is drawn up immediately in the presence of the persons who attended; if they so request, they must be provided with a copy of the search warrant and of the record. Furthermore, searches for documents are subject to special restrictions. In addition, suspects are entitled, whatever the circumstances, to representation; anyone affected by an 'investigative measure' who has 'an interest worthy of protection in having the measure … quashed or varied' may complain to the Indictment Division of the Federal Court. Lastly, a suspect who is found to have no case to answer may seek compensation for the losses he has sustained.
> As regards the manner in which the search was conducted, the Court notes that it was at Camenzind's request that it was carried out by a single official. It took place in the applicant's presence after he had been allowed to consult the file on his case and telephone a lawyer. Admittedly, it lasted almost two hours and covered the entire house, but the investigating official did no more than check the telephones and television sets; he did not search in any furniture, examine any documents or seize anything."

> The European Court of Human Rights held at paragraph 47:-
> "47. Having regard to the safeguards provided by Swiss legislation and especially to the limited scope of the search, the Court accepts that the interference with the applicant's right to respect for his home can be considered to have been proportionate to the aim pursued and thus "necessary in a democratic society" within the meaning of Article 8. Consequently, there has not been a violation of that provision."

50. In *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145 at 146 to 147 Dickson J. of the Supreme Court of Canada held:-

> "First, for the authorization procedure to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner. This means that while the person considering the prior authorization need not be a judge, he must nevertheless, at a minimum, be capable of acting judicially. Inter alia, he must not be someone charged with investigative or prosecutorial functions under the relevant statutory scheme. The significant investigatory functions bestowed upon the Restrictive Trade Practices Commission and its members by the Act vitiated a member's ability to act in a judicial capacity in authorizing a s. 10(3) search and seizure and do not accord with the neutrality and detachment necessary to balance the interests involved.
> Second, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard consistent with s. 8 of the *Charter* for authorizing searches and seizures. Subsections 10(1) and 10(3) of the Act do not embody such a requirement. They do not, therefore, measure up to the standard imposed by s.8 of the *Charter*. The Court will not attempt to save the Act by reading into it the appropriate standards for issuing a warrant. It should not fall to the courts to fill in the details necessary to render legislative lacunae constitutional.
> In the result, subss. 10(1) and 10(3) of the *Combines Investigation Act* are inconsistent with the Charter and of no force or effect because they fail to specify an appropriate standard for the issuance of warrants and designate an improper arbiter to issue them."
> This sets an appropriately high standard for a search warrant process.

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.

40. What is left out of the argument on behalf of Kevin Braney against s 30 of the 1939 Act, as to constitutionality and its Convention compliance, is the stark difference between arrest, an ongoing process of investigation where the accused has a lawyer upon request and at all interviews, and the one-off process of search under a warrant. This is a

key factual, but also analytical difference. Upon arrest, a suspect, be that suspect the offender in respect of the crime for which the arrest took place or not, and until conviction all are presumed innocent, should be protected by basic rights. These include such legal advice as will distinguish as between the entitlement of the authorities to take sample or to require information or whereby inferences might be drawn through silence or through not mentioning in advance a fact important to a potential defence. Safeguards such as videotaping, presence of a lawyer during interviews, recording interviews, fairness of treatment, consultations, meals and sleep, which are precautions common to both s 30 detention and all other forms of detention set out in the above table, constitute the application of necessary balance after an event. Here the event is an ongoing scrutiny into someone's mind. In short, the difference between a search executed on the basis of a search warrant and the extension of detention is that a search is a one-off event while detention is an ongoing process with the purpose of investigating an offence. Once the search has been carried out the home has already been entered in an irreversible way. This is not so with an ongoing detention. Thus, a search requires prior scrutiny and care while an arrest demands the application of rights from the time it takes place and up to release. In so far as there is a difference between the procedures for arrest and detention as between s 30 and other forms of arrest and detention for different offences, this is argued by Kevin Braney to infringe Article 40.1 of the Constitution.

41. This argument is untenable. Although all are, as human persons, to "be held equal before the law", the text continues that this "shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function." Section 30, differentiated from other arrest powers, does not discriminate but rather responds differently. In the case of crimes enabling a s 30 arrest, the police power is a response to a deeply serious threat to society and the integrity of the State. This is not homogeneous with other police powers because crimes are not homogeneous with one another. Some crimes are ones for which there is no search warrant power, some crimes do not carry any power of arrest; the attendance of the offender is secured instead by a court issuing a summons requiring attendance to answer a charge and the court may order arrest if the defendant does not show up, or may proceed in his or her absence if service is properly proven. For some specific crimes there may be a right to take samples, for others there may be none. This is a matter of utility and the careful classification of a crime and of the powers needed to properly investigate it. Thus, road traffic legislation, which may encompass offences which may have consequences from the need to enforce safety on the highways, or which may involve dangerous driving causing death or serious injury, incorporates the requirement to take a breathalyser test, or formerly to give a urine or blood sample, at the option of the suspect, but only where intoxicated or drugged driving is suspected. The powers under s 30 of the 1939 Act broadly extend to what may loosely be called organised crime or terrorist offences, but not to murder. Even though it may be relevant, a murder suspect is not subject to the same constraints as to sampling as a person stopped pursuant to police powers on the road. For safety, random testing on the highways is introduced but that approach may not be applicable to other suspected offences. Stop and search powers apply under the Misuse of Drugs Act 1977 to 2016 but why not to murder suspects? The only answer should the authorities seek to investigate is arrest and this requires considerable preparation so that an investigation consequent on arrest may be worthwhile. While the patchwork quilt of police powers has been standardised to a degree by the passing of general legislation, what this might be generally seen to be illustrative of is a legislative impulse to clear up anomalies. Hence, s 10 of The Criminal Justice (Miscellaneous Provisions) Act 1997 gives a general power to the District Court

to issue a search warrant. Whereas, s 4 of the 1984 Act gives a general power of arrest to citizens and police of arrest but there will be other offences carrying a lesser penalty than 5 years or more where arrest powers exist by virtue of statute. But there are other search powers outside these general powers and there are other arrest and investigation powers as well.

42. The guarantee of equality in the Constitution at Article 40.1 is based on untenable differences in legal status being drawn on a basis of discrimination against human personality, the essence of what defines an individual as human. Obvious discriminations are on the basis of ethnicity, gender, sexuality, political allegiance or faith. But, in addition, the capacity of people may be different, as between those under age and those capable of making more mature decisions, and to strive towards equality, varying treatment may be appropriate; as where limitations for commencing actions on contract or tort differ based on the age litigants are when a wrong occurs to them; *O'Brien v Keogh* [1972] IR 144. If discrimination is alleged, the first question must revolve around what the discrimination is claimed to be and as regards what other situation or what other treatment of a class of individuals. Always, a comparator is therefore needed; *OR v An tÁrd Chláraitheoir In the Matter of s.60(8) of the Civil Registration Act 2004 and in the matter of MR and DR*[2014] 3 IR 533, O'Donnell J at paragraph 241. Every case where the law permits detention to be extended beyond 48 hours, and possibly up to 72 hours or 168 hours, requires the intervention of a judge. No instance of detention below 48 hours requires the intervention of a judge. Several other forms of arrest carry detention powers beyond those of s 30 of the 1939 Act. While the limitation as to human personality in decisions as to the constitutionality of discrimination has been treated less rigidly in recent decisions, allowing condemnation of laws which unfairly and without reason target one class of persons over another, where the argument on behalf of Kevin Braney leads is towards a principle of complete homogeneity unless headline reasons enable an obvious differentiation as between classes of administrative measures. This ignores that problems in society come and go, as with the sudden wave of addiction to heroin in Dublin inner city communities in the late 1970s, or the need to suddenly respond to viral pandemics, to the jolting realisation that organised gangs stretch controlling filaments into society that are criminogenic and invidious. There may be a legitimate legislative purpose for differing responses; hence such differing responses are not treating people as unequal before the law as these responses are to situations; *Brohoon v Ireland* [2011] 2 IR 639.

43. Part of the rationale behind the principle that legislation is presumed to be in conformity with the Constitution must be the adherence to the values of the State whereby public representatives are elected to legislate and to the measure of appreciation that courts should afford to democratic responses in the wider context of public policy or as a legitimate reaction to public emergencies. Hence, while there is a guarantee of the law upholding the equality before the law of humanity, there no absolute guarantee of equality, much less is there a requirement of mathematical uniformity; *Quinn's Supermarket v Attorney General* [1972] IR 1. Where, however, an unjustifiable difference that generates a gross inequality emerges, this requires justification on the basis of difference in capacity or on a reasoned basis of social function. To forego a contest on the political offence exemption in some cases, leaving another suspect to be extradited in respect of the same offence, breaches the equality guarantee; *McMahon v Leahy* [1984] IR 525. As does allowing foreign adoptions on a particular basis in several cases as to the authority of the Mexican High Court but refusing such recognition in other cases; *Udarás Úchtála v M &*

Others [2020] IESC 64 in that instance having a positive effect legitimating adoption in the same context as others.

44. Uniformity is not what Article 40.1 of the Constitution requires; *Re Article 26 of the Planning and Development Bill 1999* [2000] 2 IR 321, *GAG v Minister for Justice, Equality and Law Reform* [2003] 3 IR 442. As *Kelly: The Irish Constitution* at [7.2.100] explains:

> Equality does not mean uniformity; laws may legitimately differentiate, and in some situations justice requires that they must do so. The courts have several times said that Article 40.1 does not mean that any legislative scheme must present identical features to all citizens; such a mechanical uniformity, in failing to appreciate the existence of categories naturally different (in the senses relevant to the purpose of the legislation) would work inequality in its result, rather than equality.

45. The first and fundamental question is surely whether the arrest power is an impermissible interference with liberty? If it is, then if everyone arrested is treated in the same way that remains wrongful. If it is not, then unless there is a discrimination based on immutable characteristics then the scope for an inequality claim is limited, since otherwise there would be an impossible system where every time a change was made to the law it would render all extant provisions unconstitutional and contrary to the Convention. It has to be possible to develop the law incrementally and by responding to individual situations with different provisions, so long as these do not interfere with impermissibly with a fundamental right under the Constitution and under the Convention. As to extension of detention, several other powers, as the above table demonstrates, depend upon the intervention of a Superintendent to extend detention and then, perhaps at a later stage, a Chief Superintendent. All such powers depend upon reasonable suspicion and upon the reasonableness of any decision to extend the deprivation of liberty which an arrest entails. In arrest, the focus of the legislation is legitimately on a legal requirement that reason replace any supposed 'trained instinct' and extension beyond a particular limit depends upon that train of reason being demonstrated to a superior officer and beyond that to a court. Hence, rights begin on arrest and are enforced by legal assistance as a mandatory constitutional requirement. That is different to the invasive quality of a search, ordinarily a shocking intrusion into privacy and one without legal assistance where the analysis requiring compliance with the law is front-loaded to the application and the need to demonstrate before a judge or an independent high-ranking police officer that reasonable grounds exist for suspecting the presence of evidence in the targeted premises or home.

Protection from discrimination under the Convention

46. Thus there is no unlawful discrimination under the Constitution. The only alternative argument advanced was that under the European Convention on Human Rights. According to sparse submissions for Kevin Braney:

> In the alternative, Article 14 of the Convention enshrines the right not to be discriminated against in "the enjoyment of the rights and freedoms set out in the Convention" and the ECtHR has frequently emphasised that Article 14 merely complements or is ancillary to the other substantive provisions of the Convention. However, as the authors of the Council of Europe Guide on Article 14 of the Convention point out at pages 6 and 7, "the ancillary nature of Article 14 in no way

> means that the applicability of Article 14 is dependent on the existence of a violation of the substantive provision" and "to this extent it is autonomous." They also emphasise that for Article 14 to be applicable "it is necessary, but also sufficient, for the facts of the case to fall within the wider ambit of one or more of the Convention Articles," and as a consequence, the Court "has established that the prohibition of discrimination applies to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide" (at page 8).

47. Regrettably, this is the only argument advanced and at the oral hearing, held remotely over an online system, the matter was not at all developed any further. Nevertheless, this can be addressed, this alternative argument, rather concisely. Here, the argument for Kevin Braney is necessarily secondary but in analysing same, certain features common to the rejection of the constitutional argument emerge. In that regard, firstly, Article 14 of the Convention states that no one should be discriminated against "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Therefore, Kevin Braney must show that he has been discriminated against on the basis of one of the listed grounds. As already outlined, he has not been discriminated against on the basis of any personal characteristic, which rules out the majority of grounds listed in Article 14. Could his membership of an unlawful organisation amount to "other status" and therefore ground a claim under Article 14? The answer is that joining a terror organisation is not an attribute of human identity the membership of which invites human rights protection. While the Strasbourg Court did find that membership of an organisation could constitute "other status" in *Danilenkov and others v Russia* [2009] ECHR 1243 and *Grande Oriente d'Italia di Palazzo Giustiniani v Italy (No.2)* [2007] 34 EHRR 22, dealing with membership of a trade union and the Freemasons respectively, none of these cases dealt with an instance whereby membership of the organisation was unlawful. Here, in the instances condemned under the Convention, one is dealing with the kind of discrimination that cruelly and inhumanely makes a false assertion that Irish people have some aspect of inferiority or that some forms of religion generate disease or dishonesty. The world has had enough of this. What is more, in *Gerger v Turkey* [1999] ECHR 44 the Court held that differences in treatment between prisoners in relation to parole did not confer on them "other status". Mirroring the above analysis, the Court analysed homogeneity not to be the same as unlawful discrimination as the distinction had not been made between different groups of people, but rather between different types of offences, according to their gravity; European Court of Human Rights, Guide on Article 14 of the European Convention on Human Rights and Article 1 of Protocol No 12 to the Convention, at p.41. Indeed, in that case, Turkish law drew a distinction between those convicted of terrorist offences and those convicted under the ordinary law, and this was held by the court not to amount to discrimination; at paragraph 69. The current case is to be analysed on the *Gerger v Turkey* reasoning: a distinction has not been drawn between Kevin Braney, on the basis of his personal characteristics, and other suspected offenders; a distinction has been drawn between the offence which he was suspected of, that is, membership of an unlawful organisation, and other and significantly different offences. That is a legitimate distinction to draw and one that cannot ground a claim under Article 14.

48. Furthermore, this distinction between the offences listed under the 1939 Act and other offences, for example, those dealt with under the 1984 legislation, does have "an objective and reasonable justification"; *Molla Sali v Greece* [2018] 69 EHRR 2, *Fabris v*

France [2013] ECHR case 16574/08, *DH and others v Czech Republic* [2007] 23 BHRC 526, *Hoogendijk v Netherlands* [2005] 40 EHRR SE189. What is involved is not discrimination but a genuine attempt to enable investigations of serious crimes with appropriate tools. The Oireachtas, in devising the 1939 Act, had a legitimate aim in that regard, and the means employed are proportionate. Terrorist usurpation of the State, offences which illegitimately seek to advance political goals by indiscriminate and random acts, and the threat by organised crime are tidal flows of wrong, sometimes receding, sometimes in full tide, seeming to ebb by times, but in truth are always present and always so difficult to predict. Allowing a claim under Article 14 in this context would be a deviation from Strasbourg jurisprudence on this provision and would alter the very meaning of discrimination accepted today.

Extension of detention

49. In the submissions of the parties, reference is made to other provisions, principally the Criminal Justice Act 1984 and to the Offences Against the State (Amendment) Acts 1972 and 1998 and to comparative powers of detention and extension under the Criminal Justice Act 2007 and the Criminal Justice (Drug Trafficking) Act 1996, whereby detention of up to 7 days is possible, but these provisions are set out in the submissions of the parties and are adequately represented by the table above.

50. Here, the argument of Kevin Braney centres on the difference as between an independent senior officer or a judge being required constitutionally to issue a search warrant and a senior officer, who may have an involvement in the investigation being enabled to extend detention from 24 hours to 48 hours upon the arrest of a suspect under s 30 of the 1939 Act. The frontloading of rights, particularly the constitutional imperative for a judge to oversee such a major intervention on privacy as the search of a home under Article 40.5 of the Constitution has already been considered. But in the safeguarding of rights post arrest it is important that an officer of high rank be fully informed as to progress since thereby any dissipation of reasons for arrest and detention may be identified and the suspect released. Further, it is important to point out that the presence of legal assistance at interviews and in generally giving private advice to suspects under temporary detention for investigation contrasts markedly with the situation of police building up a case for search and presenting that file to a judge. In the former, there is always the chance to seek review in the High Court under Article 40.4 of the Constitution and in the latter, the warrant for search, once issued, has consequences much less easy to review since there has been no legal involvement of the suspect owner or controller of the premises, for the obvious reason of pre-warning undermining efficacy, while in detention the reason for arrest and for continuing detention are capable of being the subject of representations from the accused's own lawyer as the detention continues.

51. Rights, in the context of extending detention, are as well served, and in all probability better assured, by any further time authorised by a senior officer being through someone with a complete knowledge of the case and of the progress of the investigation. It would be to trespass into legal formalism, a kind of preparation of a stamp of approval to be affixed by someone with much less insight, to instead require that an officer from outside a complex investigation would be briefed and brought to a sufficient level of knowledge. That could be redolent of an exercise lacking in substance. No more than any other legal issue, this is not one capable of substantial analysis as if it were a pure legal problem divorced from what has happened in reality. It is important to refer to the facts as found

by the High Court as to the material upon which and as to why Superintendent Maguire, extended the detention for a further 24 hours beyond the initial arrest power detention of 24 hours. This is set out in the judgment of Barr J:

> 13. In his affidavit sworn on 24th June, 2019, Chief Superintendent Maguire stated that he had based his decision to extend the applicant's detention for a further period of 24 hours on what had been done in the initial 24-hour period of detention and, more importantly, what needed to be done in the second 24-hour period. He stated that he was satisfied that the reasons outlined to him by D/I Mulleady for the applicant's continued detention were of sufficient weight and seriousness to warrant the grant of an extension to his detention and that that was proportionate.

52. Thus, according to the facts found by the High Court, this was an objective assessment of the situation of the detention such that passed judicial scrutiny. That is, indeed, what is required. In part, this finding was based on the sworn affidavit of Chief Superintendent Maguire, of 14 March 2019, where he testified:

> I can confirm that I did have an involvement with the Applicant's investigation. While the Senior Investigation Officer was Detective Inspector Nigel Mulleady. I was aware of the background of the investigation. It is normal practice for any Chief Superintendent, including the Chief Superintendent of the Special Detective Unit to have prior knowledge of the fact that their staff were going to carry out an arrest. I was aware that the Special Detective Unit would arrest the Applicant. During the course of the Applicant's detention I received briefings as to the progress of the investigation.

53. Further, there is no finding that Chief Superintendent Maguire directed that Kevin Braney be arrested and this is deposed to in an affidavit sworn by him on 24 June 2019. Instead, he informed Detective Inspector Gibbons "that the operations in question were IRA operations and required an intervention because I had in my possession confidential information which led me to fear for the safety of a person present and I feared that there was an immediate threat to that person's life". This is entirely proper and constitutes the discharge of the fundamental duty of a police officer of keeping the peace. He was also not physically present. This level of knowledge is important. Being aware of the arrest by Detective Sergeant Boyce and of the rationale behind the arrest, the need for scrutiny of the investigation and an expert knowledge of progress meant that the Chief Superintendent was exercising a real supervision that would not perhaps exist in the same way were it necessary to brief an officer of equivalent rank from the Donegal Division or the Tipperary Division. Instead, he was able to base the decision to extend on what had been done in his initial 24-hour period of detention, and most significantly what needed to be done in the second 24-hour period. He was satisfied that the reasons for the Appellant's continued detention were of sufficient weight and seriousness and to warrant the grant of an extension to his detention, and that this was proportionate. The limited nature of the duration of detention requires prior preparation and the checking of all matters which might emerge as important as the suspect is being interviewed.

54. The entire point of this is that there can be no arbitrary exercise of powers that impinge on the inviolability of the dwelling under Article 40.5 or which temporarily diminish liberty under Article 40.4.1 of the Constitution. Where the rights are focused may be different but for that there is, as pointed out, a reason. The reasonableness

standard means that those exercising such powers are bound to think through and justify what is done. Reason to act, which is not proof of guilt and which is not either a mere hunch, is the touchstone whereby such powers are exercised. It is important to note that it is not ordinary garda officers acting on their own who arrest suspects under s 30 of the 1939 Act. Such arrests, experience demonstrates, are now carried out under the command of the Special Detective Unit, as ordered by a senior officer; see Alice Harrison, *The Special Criminal Court: Practice and Procedure* at 4.16-4.20. Therefore, arrests under s 30 are within the specific administrative remit of this body which must have a reasonable suspicion before any such arrest takes place. In search powers, it is insufficient for the officer seeking the warrant to have a reasonable suspicion, nor the officer seeking an extension of detention, or the exercise of some other power. While that officer may have such a suspicion based on hearsay, or what another person has told him or her, that officer must communicate reason to the judge or to the superior officer. Merely making an averment that he or she has such a suspicion is insufficient for the judge or superior officer to act on it. In short, that judge or superior officer must be sufficiently informed to justify the reasonable exercise of any such intrusion; search differing from detention for investigation in the manner indicated. This requires development.

55. The standard of information required by a superior officer which would cause the Chief Superintendent, as a reasonable person, to suspect that the statutory formula applied to the premises in respect of which they issued the warrant; *The People (DPP) v Kenny* [1990] 2 IR 110, *The People (DPP) v Yamanoha* [1994] 1 IR 565. There is a further advantage to having a police officer extend detention, which is that the District Court is a court of record and it is therefore not necessary, or possible, to call the judge to give evidence as to what was in his mind; The Courts Act 1971 s 13. Where, however, a high-ranking police officer issues an authorisation, then, if that extension is challenged by the defence, that issuing authority must be called to prove the rationality of the state of mind justifying the further detention; *The People (DPP) v Owens* [1999] 2 IR 16. Thus, where the officer extends the period of detention of an accused person under s 30 of the same Act, then if such search or detention is challenged by the accused those officers must be called in evidence to prove the state of their minds; *The People (DPP) v Byrne* [1987] IR 363.

56. Any absolute requirement for what, in reality, would only be the appearance of independence may impede the securing of rights and would also impede efficiency. While the decision of the Court of Appeal in *DPP v Howard* [2016] IECA 219 does not bind this Court, there is persuasive sense in the reasoning of Edwards J:

> 91. It also bears reiterating that there is no mention in the legislation of any requirement that a garda officer of superintendent rank or higher involved in authorising the extension of a prisoner's detention should be independent of the investigation. Moreover, the Act of 1984, the Act of 1996 and the Act of 2007 are all post 1937 statutes and enjoy a presumption of constitutionality. The appellant has not sought to challenge the constitutionality of s. 50 of the Act of 2007 which creates the specific custody scheme with which we are concerned. These considerations suggest that the trial judge was correct in his ruling that the appellant was at all times in lawful custody, and *prima facie* would seem to be dispositive of the issue raised by the appellant. However, the appellant's case goes further in that he contends that even if the legislation is not unconstitutional in its terms, it must still be operated in a constitutional fashion. According to this argument, notwithstanding the absence of any express requirement in the statute

> that the decision maker with respect to an extension of detention should be independent, such a requirement must necessarily be implied if the legislation is to be operated in conformity with the Constitution.

57. This decision concerned a detention extended under a different power by a Superintendent, not a s 30 detention, but while the nature of detention may justify the legislature requiring the application of reasoning by a superior officer, a Chief Superintendent, the rationale is persuasive as to falsity of the analogy drawn on behalf of Kevin Braney with *Damache*:

> 77. While this argument is superficially attractive at one level, it seems to this Court that it is flawed in that it assumes that in the case of any proposed authorization by the Oireachtas of an interference with a constitutionally protected right, the only effective safeguard against inappropriate use, or possible abuse, of the powers to be so created will be to confine their exercise to a decision maker who is independent. We do not consider that such an assumption is justified, and we are satisfied that the facts underlying the decision in *Damache v Director of Public Prosecutions* [2012] 2 I.R. 266 were very different from those of the present case and that that case is legitimately distinguishable.
>
> 94. We are satisfied that in the circumstances of the present case there were more than adequate safeguards in place to ensure that any deprivation of the appellant's liberty was proportionate. Chief amongst these were the fact that he was fully informed as to the basis for his initial detention and the proposal to further detain him, that he was fully aware of his rights, that his conditions of detention were being supervised by an independent Member in Charge, that he had the benefit of legal advice at all stages, and that he had the right to seek *habeas corpus* (an enquiry under Article 40.4) if he believed that he was being unlawfully detained.

58. Similarly, see the judgment of the Court of Appeal in *DPP v Glennon* [2018] IECA 211 where an exact parallel with *Damache* was rejected as to the non-s 30 powers of officers of high rank authorising the taking of finger prints, palm prints and saliva samples. On a s 30 detention, it was argued that there should be a member in charge who was independent of the investigation. According to Birmingham P:

> 5. The Court begins its consideration of this issue by pointing out that there is no statutory requirement that a Garda officer of appropriate rank performing the duty must be someone independent of the investigation. What is sought therefore is to read into the legislation something that is not there. The Court then calls to mind the well-known observations of Oliver Wendell Holmes that the life of the law has not been logic; it has been experience. The Court is not at all persuaded that there is any analogy to be drawn between the position of a member of an investigation team issuing a warrant to search a dwelling and the position of officers involved in the investigation taking decisions in relation to somebody who, on this scenario, has been lawfully arrested and validly detained. It seems to us that it would be destructive of the efficiencies required and expected of An Garda Síochána to exclude from decision making those who are best equipped to form judgments; those who are most familiar with the investigation. As the case of *DPP v. Gary Howard* [2016] IECA 219 establishes, where what was essentially the same argument was advanced in the context of s.

> 50 of the Criminal Justice Act 2007, the argument would find favour only if abstract logic were to be preferred to the experience of the law. The Court does not see this as a point of substance and has no hesitation in rejecting this Ground of Appeal.

59. Substantial differences justify a different approach from *Damache*. In addition, and more importantly, no evidence or substantial argument emerges to demonstrate that as a matter of fact in this case or as a matter of principle, generally, there has been any departure from the standard of care and reasonableness required in the safeguarding of rights.

Arrest for an event

60. Another point mentioned on appeal requires to be clarified. That is that artificial distinctions can be drawn as between offences. In reality crimes often overlap in time or one action may be two crimes; as in pushing a woman in the back to tear away her handbag – both a theft and an assault. Arrest normally and naturally is effected for an event. A criminal event may give rise to, and naturally does involve, suspicion as to the perpetration of several possible crimes. For instance, a man enters a building by smashing a window or forcing a door. While there he steals. Upon the owner unexpectedly returning, he attacks the occupier, causing him serious harm in the course of an assault. He leaves the premises, but the owner manages to ring the police who respond quickly, whereupon the suspect drives through several red lights and on the wrong side of the road. It may not be artificial to divide the house intrusion crimes from the crime of dangerous driving but it would be artificial ever to have a rule that on arresting a suspect for an offence that such suspect may not be questioned as to every crime connected to and leading to that index event. See, in that regard, the discussion in *The People (DPP) v FE* [2019] IESC 85 paragraphs 11-21 which relates to sexual violence but restates the principle generally that events within the commission of an offence should not be legally segregated out in a manner contrary to reason. Arrest in respect of an event is what the law rightly permits; *The People (DPP) v Howley* [1988] 3 Frewen 130, *The People (DPP) v Quilligan and O'Reilly*; see the comments of Walsh J in *The People (DPP) v Walsh* [1989] 3 Frewen 248 whereby he discusses the distinction between arresting a person for an offence under s 30 purely to question that person as to another, non-scheduled, offence and a case where an officer is genuinely concerned with investigating a scheduled offence but questions the suspect as to other non-scheduled offences which are linked to the scheduled offence. *The State (Bowes) v Fitzpatrick* [1987] ILRM 195 is an example of the former – the defendant in that case had stabbed two ladies and had been arrested on the basis of malicious damage to their clothing. As explained above, the modern schedule to the 1939 Act does not permit arrest for malicious, or as now named criminal, damage.

61. That law is not changed by s 30(3A) of the 1939 Act. This provides:

> If at any time during the detention of a person pursuant to this section a member of the Garda Síochána, with reasonable cause, suspects that person of having committed an offence (the "other offence") referred to in subsection (1) of this section, being an offence other than the offence to which the detention relates, and—

> (a) the member of the Garda Síochána then in charge of the Garda Síochána station, or
> (b) in case the person is being detained in a place of detention, other than a Garda Síochána station, an officer of the Garda Síochána not below the rank of inspector who is not investigating the offence to which the detention relates or the other offence,
>
> has reasonable grounds for believing that the continued detention of the person is necessary for the proper investigation of the other offence, the person may continue to be detained in relation to the other offence as if that offence was the offence for which the person was originally detained, but nothing in this subsection authorises the detention of the person for a period that is longer than the period which is authorised by or under the other provisions of this section.

62. What this does, however, mean is that, on arrest for one event, a suspect may be questioned as to crimes involved in or linked to that event. But they may only be questioned about a completely unconnected event in accordance with the subsection through the authorisation of a superior officer and not in such a way as to extend the period of detention beyond the statutory maximum. It is the extension that the subsection is directed against.

Inference from silence

63. Section 2 of the Offences Against the State (Amendment) Act 1998 Act is not challenged in this appeal as to constitutionality, or Convention conformity. It reads as applicable exclusively to a charge of membership of an unlawful organisation:

> (1) Where in any proceedings against a person for an offence under section 21 of the Act of 1939 evidence is given that the accused at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, failed to answer any question material to the investigation of the offence, then the court in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely on an inference drawn from such a failure.
>
> (2) Subsection (1) shall not have effect unless the accused was told in ordinary language when being questioned what the effect of such a failure might be.
>
> (3) Nothing in this section shall, in any proceedings—
>
> > (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from this section, or

> (b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could be properly drawn apart from this section.
>
> (4) In this section—
>
> (a) references to any question material to the investigation include references to any question requesting the accused to give a full account of his or her movements, actions, activities or associations during any specified period,
>
> (b) references to a failure to answer include references to the giving of an answer that is false or misleading and references to the silence or other reaction of the accused shall be construed accordingly.
>
> (5) This section shall not apply in relation to failure to answer a question if the failure occurred before the passing of this Act.

64. Situations where a person is accused of a wrong and which call reasonably for a denial can amount to an admission. The general rule as regards investigations where a suspect is being questioned in custody is that it is not permissible to draw adverse inferences from an accused's silence while being questioned by the police: *The People (DPP) v Finnerty* [1999] 4 IR 364. Outside situations, as in *R v Mitchell* (1892) 17 Cox CC 503 an admission may be inferred where a charge of misconduct is made in a person's presence, by persons "speaking on even terms" and it is reasonable to expect that they will immediately deny it or become indignant. This principle is of general application to both civil and criminal law; *Ulster Bank Ireland Ltd v O'Brien* [2015] 2 IR 656, 687.

65. Other provisions are similar in their effects to s 2 of the 1998 Act. Section 19A (4)(b) of the Criminal Justice Act, 1984, as amended states that nothing in the section shall, in any proceedings "be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this section." This exercise in logic is preserved in s 2 of the 1998 Act also. A number of statutory provisions have been enacted which permit the drawing of adverse inferences. These provisions, like s 2 of the 1998 Act, also afford additional protections to an accused. There, silence in the face of specific questions from which an inference may be drawn beyond reasonable doubt, are insufficient for conviction but may merely be evidence. Similarly, a person cannot be convicted solely or mainly on a failure to account for certain objects in their possession or for their presence in a particular place, pursuant to Section 19A(1) of the Criminal Justice Act, 1984, as amended, applying to offences carrying a possible maximum sentence of five years imprisonment or more. It is required in all such provisions that the ordinary caution that a suspect is "not obliged to say anything" must be withdrawn and that the accused must be informed of the consequences of failure to give an explanation. A solicitor will be present for such an event, unless consciously waived, and an accused must be given a reasonable opportunity to consult a solicitor before such inferences can be drawn. The questions from which adverse inferences are drawn must be recorded by electronic or similar means or the accused must consciously choose that the interview not be recorded. Inferences may be drawn only in respect of an arrestable offence.

66. There is no automatic inclusion as an item of prosecution evidence that the accused failed to answer a question. The situation must be such as would as a matter of logic lead beyond reasonable doubt to an inference capable of supporting guilt but may not of itself be used without other evidence compelling a finding against the accused. Thus in *The People (DPP) v. Kelly* [2007] IECCA 110 the Court of Criminal Appeal accepted the correctness in particular circumstances of an adverse inference pursuant to section 2 of the 1998 Act in circumstances where an accused refused to answer virtually all of the questions, both material and immaterial, to the offence put to him in interview. It is in the context of some issue as to rationally suspicious circumstances which the accused chooses not to explain, the point having been put as a question, whereby an inference may be drawn. The section does not go beyond that; *Redmond v Ireland* [2015] 4 IR 84 paragraph 44.

67. The complaint made by Kevin Braney is that this provision is operative on a charge of membership of an unlawful organisation, as the s 2 of the 1998 Act states. Inferences, as outlined above, are possible on this charge since the approach of the courts is not to proceed to conviction on the belief evidence of a Chief Superintendent without corroboration, some independent evidence tending to demonstrate the accused's involvement in the crime; *Rock v Ireland* [1997] 3 IR 484. There it is stated that if inferences are properly drawn, such inferences amount to evidence only; they are not to be taken as proof. Thus, on this authority, a person may not be convicted of an offence solely on the basis of inferences that may properly be drawn from his failure to account; such inference may only be used as corroboration of any other evidence in relation to which the failure or refusal is material. That possibility of an inference being drawn can, on this authority, be shaken in many ways, by cross-examination, by submission, by evidence or by the circumstances of the case. The case is authority for the proposition that it is for the legislature to decide where an absence of an explanation may lead to an inference being drawn, both in respect of the circumstances, such as marks or refusal to provide samples, and in respect of the offence. Here, membership of a secret and criminal group is notoriously difficult of to prove , denial is a matter of choice for a suspect and inference from failure to respond is only possible where that logically arises and is capable only of being supporting evidence.

68. In so far as a complaint arises as to an intrusion into any right to silence, this has been considered by this Court in *Sweeney v Ireland* [2019] IESC 39 as to the parameters of what is possible and the decisions of the European Court of Human Rights therein considered. In *Saunders v. UK* (1996) 23 EHRR 313 at paragraph 69 the Strasbourg Court held that Article 6 "does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing". As to verbal silence, this is not so absolute a situation that, provided there are safeguards, no inference may ever be drawn from it.

69. Briefly, it is clear that the right to silence is not absolute but may be subject to legislative restrictions which are proportional; *Heaney v. Ireland* [1996] IR 580; *Rock v Ireland* at paragraph 501. Convention rights do not preclude the drawing of inferences from an accused's silence. This is not of itself incompatible with Article 6 of the Convention, once sufficient safeguards exist. Article 6 of the Convention prohibits an "improper compulsion" to answer questions, which occurs where the very essence of the right to silence is abrogated; *Saunders v UK, Sweeney v Ireland, Murray v. UK* (1996) 22

EHRR 29. In *Murray*, the accused was tried on terrorist offences and a judge, sitting alone (due to the legislation in Northern Ireland, though note that the Special Criminal Court in Ireland requires three judges) drew inferences from the applicant's failure to explain his presence in the house where he was arrested and from his failure to give evidence at trial. It was noted that appropriate safeguards were in place. These were cautioning, that a case otherwise was in place and that, as in s 2 of the 1998 Act, the judge had discretion as to whether or not to draw inferences and was required to give reasons for doing so. The Strasbourg Court held that given these safeguards and the strength of the case against the accused the drawing of inferences on the facts at issue was a matter of common sense. The Court at paragraph 47 held that a conviction should not be based "solely or mainly" on the silence of the accused but that silence can be taken into account in situations "which clearly call for an explanation". This analysis accords to the reasoning in *Jalloh v. Germany* (2006) 44 EHRR 32, the tests being: firstly, the nature and degree of the compulsion against silence; secondly, the existence of any relevant procedural safeguards; thirdly, the use to which any material so obtained is put; and, finally, the weight of public interest in the investigation. See also *Heaney and McGuinness v. Ireland* (2001) 33 EHRR 12.

70. In *Sweeney v. Ireland,* this Court, Charleton J, at paragraph 84 analysed those circumspections of the right to silence in accordance with the Strasbourg decisions thus:

> Furthermore, the Court has identified at least three kinds of situations which can lead to a finding of a breach by a Member State of the right not to self-incriminate. The first is where a suspect is obliged to testify under threat of sanctions and testifies as a result, such as in *Saunders* where evidence which had been obtained under compulsion from the applicant in company insolvency procedures was used against him in a prosecution; see also *Brusco v France* [2010] ECHR 1 621. A breach may also be found where an applicant refuses to give information against themselves and is subsequently sanctioned; such as in *Heaney and McGuinness* and *Weh v Austria* (2004) 40 EHRR 37. The second situation is where physical or psychological pressure, which may also lead the Court finding a breach of Article 3 which prohibits torture and inhuman or degrading treatment or punishment, is exerted on the applicant in order to obtain a statement or evidence; see *Jalloh* and *Gäfgen v Germany* [2009] 48 EHRR 253. The third type of case is where the authorities resort to subterfuge to get the information that they were unable to obtain during questioning; *Allan v United Kingdom* (2003) 36 EHRR 12. An example of that would be a statement by interviewing police officers who falsely state that the arrested person's fingerprint has been found at the scene or untruthfully claim that another participant in the offence has confessed and placed the suspect as acting in concert with him or her.

71. None of these situations have any application to the instant case.

Prior Supreme Court authority

72. As noted at the commencement of this judgment, s 30 of the 1939 Act was found by this Court to be in conformity with the Constitution in the decision in *Quilligan and O'Reilly* in 1986. It is argued by Kevin Braney that at that time only s 30 existed, standing alone, as a means of detention for questioning, the powers under s 4 of the 1984 Act having been passed but which awaited detailed regulation before being made operative some three years later. With the passing of still later legislation, it is asserted that a comparison as between the administration of arrest set up in s 30 of the 1939 Act and

the later, and varied, powers as to arrest for a time certain, extension by a senior officer in possession of the requisite facts justifying the further detention for the investigation of that offence and conscious of the original grounds of suspicion as reasonable, the legislative landscape has altered so as to cast s 30 as not just an outlier but as an unjustifiable and unequal infringement on liberty. In other words, the contention asserts, if the necessarily continually shifting landscape of criminal procedure as to arrest and the protection of suspects under limited detention for investigation changes since the time when a provision was declared by this Court to be in conformity with the Constitution, all prior decisions become capable of being revisited.

73. This assertion puts the Constitution in an inferior position to statute and common law; the argument being that changes in law operate so as to change the constitutional order. That cannot be. The Constitution is the star fixed by the will of the Irish people as their fundamental law around which the planets of legislative will and common law development revolve. It is for statutory provisions to conform to the Constitution and of the nature of a fundamental law, such as do not conform will be struck down. Since the passing of the Constitution, and the many amendments made by the people in referendum, while the common law has evolved over centuries, its adoption under Article 50.1 required consistency with constitutional principles. As the common law develops in this jurisdiction, it is not simply experience is brought to bear in the interpretation as to where it may go but also the concepts of justice and true social order which are the touchstones of our fundamental law set out in the Preamble to the Constitution and informing so many of its provisions.

74. In the prior decision of this Court in *Quilligan and O'Reilly,* s 30 of the 1939 Act was held to be in conformity with the Constitution as not encroaching on the right to liberty beyond what was necessary for the investigation of very serious offences and as holding a correct balance as regards then existing powers whereby, in particular, rationality was required both in arresting a suspect and in extending the time during which the suspect was detained. Since that time, other forms of detention have emerged by legislative fiat whereby suspects may be held for investigation over a period of a week, 168 hours, with judicial intervention required after two days during which the originally reasonable suspicion and the necessity for further investigation must be judicially demonstrated. Rather than put the 1939 Act out of kilter with the general law, these statutory developments have instead imposed some more burdensome deprivations on those suspected of involvement in various categories of serious crime; but only where that suspicion is reasonable and where in all cases there is legal assistance to the person in custody and a continuing right of access by them and those acting on their behalf to the courts. That is the general constitutional bedrock of rights which ensures that despite variation in powers, as regards the suspected offences to which temporary detention powers for investigation may be applied, and notwithstanding the targeting of offences in particular categories as ones requiring to be addressed by the will of the legislature, no suspect will be held without legal justification and always with recourse to the balancing factor of legal advice and the potential invocation of the judicial power.

75. Of itself, the principle argument of shifts in legislation does not suffice. Since the 1986 decision, multiple arrests under s 30 of the 1939 Act have taken place and the power has been an essential instrument for investigating particularly serious forms of crime. This is not a case where the maxim *communis error facit ius* might be said to apply since no error has been demonstrated in the former reasoning of this Court. But starting from a proposition of constitutionality as already found by this Court and in arguing

against a key provision of police powers, contrary argument of considerable weight is called for. Article 34.5.6° of the Constitution declares that the decision of the Supreme Court on an issue "shall in all cases be final and conclusive." Or in the original version: "Ní bheidh dul thar breith na Cúirte Uachtaraí i gcás ar bith."

76. This is, under the Constitution, the Court from which there is no further judgment. As such, that places a responsibility to ensure that, not simply from the point of view of what the parties may advance, there is correct judgment, that nothing is left unconsidered. The judges have a duty to transcend adversarial contention where an argument needs to be addressed which may not have occurred to those litigating. While *stare decisis* is a policy and not an unalterable rule, all of the cases where prior decisions of the Supreme Court have been departed from in subsequent rulings have required compelling reasons as a justification in shifting from established precedent; see the judgment of Walsh J in *The State (Quinn) v Ryan* [1965] IR 70, 127 and Griffin J in *Doyle v Hearne* [1987] IR 601, 614. Following precedent is "the normal, indeed almost universal procedure"; see the judgment of Kingsmill Moore J in *Attorney General v Ryan's Car Hire Ltd* [1965] IR 642, 653. Because very careful consideration is required of judges before taking such a step, the path to reversing a decision must be paved with compelling reasons leading to a point demonstrating error in a prior judgment. Since justice is the fundamental principle upon which the constitutional order is built, and since certainty of law is an aspect of true social order that enables litigants to predict the basis of the application of any decision to their cause, it may only be in the most exceptional of cases where departure from a fully considered precedent may be considered possible.

77. At the same time, it must be recognised that interpretations of the Constitution which are in error reach beyond mistaken developments in the common law. There, what experience shows to have been in error may readily be corrected judicially. While statutory interpretations are capable of being reacted to by the legislature swiftly, that consideration does not apply to incorrect constitutional interpretation. Furthermore, the judges of a final appellate court have a particular responsibility to defend the Constitution in its correct form and so may be compelled to revisit a decision where error is demonstrated. Nonetheless, this requires the argument that a prior decision was wrong to be irresistible or for a shift in the interpretation of a provision to be demonstrated as compelling. No such compelling argument has been advanced here.

Result

78. Kevin Braney has asserted that, because the provisions regarding extension of detention under s 30 of the 1939 Act differ from those applying to other forms of arrest, such as under the 1984 Act, there is a contravention of the Constitution and the European Convention on Human Rights. The forgoing analysis demonstrates the unsoundness of this argument. The only difference between the procedure of extending detention under the 1984 Act and the 1939 Act is that under the former a second opinion of a garda in charge of the station is required. Aside from this, there remains a floor of rights applicable to both forms of arrests and detentions. A suspect arrested under the 1939 Act has, to the same extent as someone arrested under the later Act, the right of access to a lawyer, and for this they can receive legal aid. This right facilitates access to the courts for all suspected persons and protection whilst being questioned. The overarching requirement that someone can only be arrested on the grounds of reasonable suspicion protects all people from illegitimate intrusions on their right to liberty, whether or not they are suspected of having committed a scheduled offence

under the 1939 Act. As soon as any reasonable suspicion may dissipate, the suspect's liberty must automatically be restored. It is legitimate for the Oireachtas to differentiate between the offences under the 1939 Act, which are aimed at targeting terrorist and organised crime activities, and those general offences under the 1984 Act. There are other categories of offences as well. Different offences require different procedures with regard to arrest and detention, and so long as the floor of rights outlined above is, no contravention of the Constitution or the Convention occurs. Depending on the gravity of an offence, or the social turmoil caused by a particular criminal activity a legislature will respond specifically. This will result in varied provisions and varied police powers. With arrests under s 30 of the 1939 Act, that response is to be analysed within a tier of police powers that are different from each other, but the key question must be the justification on social and democratic grounds for so responding. With a floor of rights in each case below which no form of detention may proceed the issue is the adequacy of what is in Irish law a set of universally applicable rights.

79. In addition, Kevin Braney has drawn an analogy with the procedure for searching a suspect's home, the subject of the decision in *Damache*: as only a judge or uninvolved police officer can issue a search warrant, only a judge or uninvolved police officer can extend detention. On his argument, any differentiation in procedure between search warrants and extension of detention upon arresting a suspect infringes Article 40.1 of the Constitution. This is not so. In order to infringe the principle of equal treatment, the differentiation between people must be based on human characteristics. Here the difference is as to the nature of what happens and the necessity that democratic institutions have seen as required for particular kinds of crime. Both searches and detention involve the infringement of rights, but that does not mean that the procedures applying to both have to be identical. The nature of the infringements are different which therefore allows, and indeed requires, different safeguards to be put in place. A search of a home or a bomb-making warehouse is a one-off event, requiring a front-loading of rights, it does not enquire into the contents of someone's mind but of the fixed nature of objects and marks in a place; the utmost care must be taken prior to the infringement of the right. This is reflected in the reasonable cause standard. It is important to note that while a search is ongoing the person subjected to the search does not a have a right of access to a lawyer, unlike when a suspect is arrested and detained. Detention is an ongoing process which requires that from the point of arrest onwards a floor of rights must be protected. The minds of those detained can be wrongfully influenced and admissions mistakenly induced through pressure or suggestion. Hence, rights to legal advice and presence during questioning start with arrest and for the very good reasons related to the difference in the nature of a physical search and the mental responses to the posing of structured questions. Any argument which proposes that the safeguards in place for searches should, by way of analogy, be applied to an extension of detention, must be rejected therefore as untenable for the reasons set out in this judgment.

80. It is proposed that for those arguments offered on behalf of Kevin Braney that this Court should depart from a prior decision upholding the constitutionality of s 30 detention; that in *The People (DPP) v Quilligan and O'Reilly (No 3)* [1993] 2 IR 305 which concerned the brutal killing of a farmer in the course of a break in at his home and that of his brother, who afterwards did not again lead an independent life, though he survived.

81. No sufficient case has been made out whereby changes in the laws promulgated by the Oireachtas on behalf of the people and which are required to conform to the

Constitution have themselves, through some unexplained alchemy, been posited as having changed the fundamental constitutional order.

82. In consequence, the claim of Kevin Braney that s 30 of the Offences Against the State Act 1939 contravenes the Constitution and the European Convention on Human Rights is dismissed.

Appendix I

The full text of section 30 of the Offences Against the State Act 1939 as amended

> (1) A member of the Garda Síochána (if he is not in uniform on production of his identification card if demanded) may without warrant stop, search, interrogate, and arrest any person, or do any one or more of those things in respect of any person, whom he suspects of having committed or being about to commit or being or having been concerned in the commission of an offence under any section or sub-section of this Act or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act or whom he suspects of carrying a document relating to the commission or intended commission of any such offence as aforesaid or whom he suspects of being in possession of information relating to the commission or intended commission of any such offence as aforesaid.
> (2) Any member of the Garda Síochána (if he is not in uniform on production of his identification card if demanded) may, for the purpose of the exercise of any of the powers conferred by the next preceding sub-section of this section, stop and search (if necessary by force) any vehicle or any ship, boat, or other vessel which he suspects to contain a person whom he is empowered by the said sub-section to arrest without warrant.
> (3) Whenever a person is arrested under this section, he may be removed to and detained in custody in a Garda Síochána station, a prison, or some other convenient place for a period of twenty-four hours from the time of his arrest and may, if an officer of the Garda Síochána not below the rank of Chief Superintendent so directs, be so detained for a further period of twenty-four hours.
> (3A) If at any time during the detention of a person pursuant to this section a member of the Garda Síochána, with reasonable cause, suspects that person of having committed an offence (the "other offence") referred to in subsection (1) of this section, being an offence other than the offence to which the detention relates, and—
>
> > (a) the member of the Garda Síochána then in charge of the Garda Síochána station, or
> > (b) in case the person is being detained in a place of detention, other than a Garda Síochána station, an officer of the Garda Síochána not below the rank of inspector who is not investigating the offence to which the detention relates or the other offence, has reasonable grounds for believing that the continued detention of the person is necessary for the proper investigation of the other offence, the person may continue to be detained in relation to the other offence as if that offence was the offence for which the person was originally detained, but nothing in this

subsection authorises the detention of the person for a period that is longer than the period which is authorised by or under the other provisions of this section.

(4) An officer of the Garda Síochána not below the rank of superintendent may apply to a judge of the District Court for a warrant authorising the detention of a person detained pursuant to a direction under subsection (3) of this section for a further period not exceeding 24 hours if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(4A) On an application under subsection (4) of this section the judge concerned shall issue a warrant authorising the detention of the person to whom the application relates for a further period not exceeding 24 hours if, but only if, the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.

(4B) On an application under subsection (4) of this section the person to whom the application relates shall be produced before the judge concerned and the judge shall hear any submissions made and consider any evidence adduced by or on behalf of the person and the officer of the Garda Síochána making the application.

(4BA)

(a) Without prejudice to paragraph (b) of this subsection, where a judge hearing an application under subsection (4) of this section is satisfied, in order to avoid a risk of prejudice to the investigation concerned, that it is desirable to do so, he may—

(i) direct that the application be heard otherwise than in public, or

(ii) exclude from the Court during the hearing all persons except officers of the Court, persons directly concerned in the proceedings, *bona fide* representatives of the Press and such other persons as the Court may permit to remain.

(b) On the hearing of an application under subsection (4) of this section, the judge may, of his own motion or on application by the officer of the Garda Síochána making the application under that subsection (4), where it appears that—

(i) particular evidence to be given by any member of the Garda Síochána during the hearing (including evidence by way of answer to a question asked of the member in cross-examination) concerns steps that have been, or may be, taken in the course of any inquiry or investigation being conducted by the Garda Síochána with respect to the suspected involvement of the person to whom the application relates, or any other person, in the commission of the offence to which the detention relates or any other offence, and

(ii) the nature of those steps is such that the giving of that evidence concerning them could prejudice, in a material respect, the proper conducting of any foregoing inquiry or investigation, direct that, in the public interest, the particular evidence shall be given in the absence of every person, including the person to whom the application relates and any legal representative (whether of that person or the applicant), other than—

(I) the member or members whose attendance is necessary for the purpose of giving the evidence to the judge; and

(II) if the judge deems it appropriate, such one or more of the clerks of the Court as the judge determines.

(c) If, having heard such evidence given in that manner, the judge considers the disclosure of the matters to which that evidence relates would not have the effect referred to in paragraph (b)(ii) of this subsection, the judge shall direct the evidence to be re-given in the presence of all the other persons (or, as the case may be, those of them not otherwise excluded from the Court under paragraph (a) of this subsection).

(d) No person shall publish or broadcast or cause to be published or broadcast any information about an application under subsection (4) of this section other than a statement of—

(i) the fact that the application has been made by the Garda Síochána in relation to a particular investigation, and

(ii) any decision resulting from the application.

(e) If any matter is published or broadcast in contravention of paragraph (d) of this subsection, the following persons, namely—

(i) in the case of a publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical,

(ii) in the case of any other publication, the person who publishes it, and

(iii) in the case of a broadcast, any person who transmits or provides the programme in which the broadcast is made and any person having functions in relation to the programme corresponding to those of the editor of a newspaper, shall be guilty of an offence and shall be liable—

(I) on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 12 months or to both, or

(II) on conviction on indictment, to a fine not exceeding €50,000 or to imprisonment for a term not exceeding 3 years or to both.

(f) In this subsection—

"broadcast" means the transmission, relaying or distribution by wireless telegraphy, cable or the internet of communications, sounds, signs, visual images or signals, intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not;

"publish" means publish, other than by way of broadcast, to the public or a portion of the public.

(4BB) Save where any rule of law requires such an issue to be determined by the Court, in an application under subsection (4) of this section no issue as to the lawfulness of the arrest or detention of the person to whom the application relates may be raised.

(4BC)

(a) In an application under subsection (4) of this section it shall not be necessary for a member of the Garda Síochána, other than the officer making the application, to give oral evidence for the purposes of the application and the latter officer may testify in relation to any matter within the knowledge of another member of the Garda Síochána that is relevant to the application notwithstanding that it is not within the personal knowledge of the officer.

(b) However, the Court hearing such an application may, if it considers it to be in the interests of justice to do so, direct that another member of

the Garda Síochána give oral evidence and the Court may adjourn the hearing of the application for the purpose of receiving such evidence.

(4C) A person detained under this section may, at any time during such detention, be charged before the District Court or a Special Criminal Court with an offence or be released by direction of an officer of the Garda Síochána and shall, if not so charged or released, be released at the expiration of the period of detention authorised by or under subsection (3) of this section or, as the case may be, that subsection and subsection (4A) of this section,] [or, in case the detention follows an arrest under a warrant issued pursuant to section 30A of this Act, by subsection (3) of this subsec-tion as substituted by the said section 30A.

(4D) If—

(a) an application is to be made, or is made, under subsection (4) of this section for a warrant authorising the detention for a further period of a person detained pursuant to a direction under subsection (3) of this section, and

(b) the period of detention under subsection (3) of this section has not expired at the time of the arrival of the person concerned at the court house for the purposes of the hearing of the application but would, but for this subsection, expire before, or during the hearing (including, if such should occur, any adjournment of the hearing), it shall be deemed not to expire until the final determination of the application; and, for purposes of this subsection—

(i) a certificate signed by the court clerk in attendance at the court house concerned stating the time of the arrival of the person concerned at that court house shall be evidence, until the contrary is shown, of the time of that person's arrival there;

(ii) "court house" includes any venue at which the hearing of the application takes place.

(5) A member of the Gárda Síochána may do all or any of the following things in respect of a person detained under this section, that is to say:—

(a) demand of such person his name and address;

(b) search such person or cause him to be searched;

(c) photograph such person or cause him to be photographed;

(d) take, or cause to be taken, the fingerprints of such person.

(6) Every person who shall obstruct or impede the exercise in respect of him by a member of the Gárda Síochána of any of the powers conferred by the next preceding sub-section of this section or shall fail or refuse to give his name and address or shall give, in response to any such demand, a name or an address which is false or misleading shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six mouths.

Appendix II

Scheduled criminal offences under the Offences Against the State Acts 1939-1998
Acknowledgment to Alice Harrison – The Special Criminal Court: Practice and Procedure (Dublin, 2019)

Criminal Justice Act 2006
s 71A Directing a criminal organisation. Criminal Justice (Amendment)

Act 2009, s 8 (CJ(A)A 2009, s 8)
s 72 Participating in or contributing to the activities of a criminal organisation.
CJ(A)A 2009, s 8
s 73 Commission of an offence for a criminal organisation. CJ(A)A 2009, s 8
s 76 Liability for offences by bodies corporate. CJ(A)A 2009, s 8

Explosive Substances Act 1883

s 2 Causing an explosion likely to endanger life or property. Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)
s 3 Attempt to cause explosion, or for making or keeping explosives with an intent to endanger life or property. SI 142/1972
s 4 Making or possession of explosive under suspicious circumstances. SI 142/1972

Firearms Act 1925

s 2 Possession, use and carriage of firearms or ammunition. Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)
s 2A Failure to comply with conditions of firearms training certificate. SI 142/1972
s 2C Possession, use, carriage, manufacture, sale, hire, offer or exposure for sale or hire, display, loan, give, import a prohibited firearm or ammunition. SI 142/1972
s 3 Gives false information in respect of a firearm certificate. SI 142/1972
s 3(13)(a) Gives false information in respect of a firearm certificate. SI 142/1972
s 3(13)(b) Forges a document purporting to be a firearm certificate. SI 142/1972
s 3(13)(c) Uses or alters a firearm certificate. SI 142/1972
s 4A Obstructing a member of An Garda Síochána in his functions relating to the authorisation of rifle or pistol clubs or shooting ranges. SI 142/1972
s 4C Prohibition of practical or dynamic shooting. SI 142/1972
s 5A Failure by firearm certificate holder to report firearm or ammunition as lost or stolen within 3 days of becoming aware of the loss. SI 142/1972
s 9(8) Conditional grant of certificate. SI 142/1972
s 10 Restrictions on manufacture and sale of firearms. SI 142/1972
s 10(1) Manufacture, sale etc. of firearms. SI 142/1972
s 10(2) Manufacture, sale etc. of firearms. SI 142/1972
s 10(3A) Manufacture, sale etc. of firearms. SI 142/1972
s 10(4) Manufacture, sale etc. of firearms. SI 142/1972
s 10A Not complying with conditions of certificate in reloading ammunition. SI 142/1972
s 11 Failure to deliver certificate of registration and register. SI 142/1972
s 12 Register to be kept by firearms dealer. SI 142/1972
s 12(4) Failure to keep register. SI 142/1972
s 12(5) Misleading information. SI 142/1972
s 13 Obstructing or impeding inspection of stock of firearms dealers. SI 142/1972
s 15 Possession of firearms with intent to endanger life. SI 142/1972
s 16 Export or removal of firearms or ammunition. SI 142/1972
s 17 Import of firearms. SI 142/1972
s 21 Obstruction of An Garda Síochána. SI 142/1972
s 22 Failure to give name and address. SI 142/1972
s 25B Failure to surrender a firearm for ballistic testing without reasonable excuse. SI 142/1972

Firearms Act 1964

s 3 Temporary prohibition of game shooting. Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)
s 4 Temporary custody of firearms. SI 142/1972

s 13 Conditional authorisations for possession and sale. SI 142/1972
s 26 Possession of a firearm while taking a vehicle without authority.
SI 142/1972
s 27 Use of firearms to resist or aid escape. SI 142/1972
s 27A Possession of a firearm or ammunition in suspicious circumstances. SI 142/1972
s 27B Carrying a firearm with criminal intent. SI 142/1972

Firearms (Proofing) Act 1968

s 4 Contravention of sale, etc order. Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)
s 6(1)(a) Application of prescribed marks. SI 142/1972
s 6(1)(b) Sale, etc of prescribed marks. SI 142/1972
s 6(1)(c) Making, etc of prescribed marks. SI 142/1972

Firearms and Offensive Weapons Act 1990

s 7(1) Possession of silencer. Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972) 1
s 7(5) Contravention of a condition attached to an authorisation (to possess, sell or transfer a silencer). SI 142/1972 1
s 8 Reckless discharge of firearms. SI 142/1972 1

Offences Against the State Act 1939

s 6 Usurpation of functions of Government. Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)
s 7 Obstruction of Government. SI 142/1972
s 8 Obstruction of the President. SI 142/1972
s 9 Interference with military or other employees of the State. SI 142/1972
s 10 Prohibition of printing etc, certain documents. SI 142/1972
s 11 Foreign newspapers etc containing seditious or unlawful matter. SI 142/1972
s 12 Possession of treasonable, seditious or incriminating documents. SI 142/1972
s 13 Documents printed for reward. SI 142/1972
s 14 Obligation to print printer's name and address on documents. SI 142/1972
s 15 Prohibition on unauthorised military exercises. SI 142/1972
s 16 Prohibition of secret societies in the army or police forces. SI 142/1972
s 17 Administering unlawful oaths. SI 142/1972
s 18 Unlawful organisations. SI 142/1972
s 21 Prohibition on membership of an unlawful organisation. SI 142/1972
s 21A Offence of providing assistance to an unlawful organisation commenced on 8 March 2005. SI 142/1972
s 27 Prohibition on certain public meetings. SI 142/1972
s 28 Prohibition of meetings in the vicinity of the Oireachtas. SI 142/1972
s 37 Attempting or conspiring or inciting to commit or aiding or abetting the commission of, any such scheduled offence under this Act shall itself be a scheduled offence. SI 142/1972

Offences Against the State (Amendment) Act 1998

s 6 Directing an unlawful organisation. Offences Against the State (Amendment) Act 1998, s 14 (OAS(A)A 1998, s 14)
s 7 Possession of articles for purpose connected with certain offences. OAS(A)A 1998, s 14
s 8 Unlawful collection of information. OAS(A)A 1998, s 14
s 9 Withholding information. OAS(A)A 1998, s 14
s 12 Training of persons in the making of, or use of firearms etc. OAS(A)A 1998, s 14

Malicious Damage Act 1861

s 36 Obstructing engines, or carriages on railways. Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)
s 37 Causing injuries to electric or magnetic telegraphs. SI 142/1972
s 38 Attempt to injure electric or magnetic telegraphs. SI 142/1972
s 40 Killing or maiming cattle. SI 142/1972
s 41 Killing or maiming other cattle, second offence. SI 142/1972
s 48 Removing or concealing buoys or other sea marks. SI 142/1972

Footnotes

It should be noted that, by virtue of the Firearms and Offensive Weapons Act 1990, s 3, the offences created by Pt II of that Act are likely to be considered to be scheduled offences. See *State (Daly) v Delap* (20 June 1980) HC. However, this question may ultimately have to be resolved by the superior courts.