



**AN CHÚIRT UACHTARACH**  
**THE SUPREME COURT**

S:AP:IE:2022:000077

**O'Donnell C.J.**  
**Dunne J.**  
**Charleton J.**  
**O'Malley J.**  
**Baker J.**  
**Hogan J.**  
**Collins J.**

**Between/**

**EMMETT CORCORAN AND ONCOR VENTURES LIMITED**  
**TRADING AS THE DEMOCRAT**

**Appellants**

**-and-**

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

**Respondents**

**Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 22<sup>nd</sup> day of June, 2023.**

1. I have read the judgments which Hogan J. and Collins J. will deliver in this matter, and I agree with them that the appeal should be dismissed, and the warrants issued on 2 April, 2019 should be quashed for the reasons set out in their respective judgments. It is, as I understand it, well established, not least by the decision of this Court in *Mahon and ors v. Keena & Kennedy* [2009] IESC 78, [2010] 1 I.R. 336 ("*Mahon v. Keena*"), that the right of journalists to protect the identity of confidential sources, while subject to exceptions, is protected by Article 10 of the European Convention on Human Rights ("ECHR"), and accordingly, by Irish law, pursuant to the European Convention on Human Rights Act, 2003 ("the 2003 Act"). It follows, therefore, that the fact that the subject of the warrant was a journalist, and a journalist's office, and that the execution of a warrant could therefore disclose, not merely the identity of a source of a particular story, but might also necessarily reveal the identity of other sources of no relevance to the Garda investigation was a matter which ought to have been communicated to the judge before the grant of a warrant.
2. Section 10 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 is, as my colleagues observe, framed in very blunt terms. However, a judge before whom an application is made for a warrant retains the possibility of granting or refusing it. Therefore, the fact that the warrant would necessarily trench upon a journalist's ability to maintain confidentiality could have been a ground upon which a judge exercised the option of refusing to grant a warrant. It follows that these facts were material facts which ought to have been brought to the attention

of the judge before any warrant was granted, and a failure to do so means the warrants must be quashed.

3. The judgments of Hogan and Collins JJ. also contain an extensive, and in my view, very valuable discussion of the extent to which the Article 40.6.1.i guarantee of freedom of expression provides that similar or comparable level of protection for journalists, however defined, seeking to protect the identity of sources of stories to that which has been held by the European Court of Human Rights (“ECtHR”) to be provided by Article 10 of the ECHR. It can certainly be said that interpretation of the freedom of expression guaranteed by Article 40.6.1.i, particularly in relation to freedom of the press, has been relatively underdeveloped in this jurisdiction, and both judgments are, therefore, a useful corrective in that respect and provide helpful comparative material, and thought-provoking analysis.
4. As both judgments acknowledge, the question was not however, debated to any extent in the appeal, and does not appear to have been the subject of any detailed argument in the High Court or Court of Appeal. While it is clear that, after *Mahon v. Keena*, and indeed, this decision itself, the existing applicable law in Ireland already provides a reasonably detailed and relatively clear code, particularly with reference to the issue of the confidentiality of sources and particularly when understood against the background of a developed jurisprudence of the ECtHR on that issue. It is, nevertheless, certainly conceivable that the question of the interpretation of Article 40.6.1.i could become decisive in particular cases, such as, for example, a challenge to the validity of legislation or where the issue arose in circumstances where, for whatever reason, the provisions of the 2003 Act did not apply. In any event, it

is desirable that there should be clarity on the question of the constitutional guarantee more generally.

5. While, therefore, I acknowledge the benefit that is achieved by the comprehensive discussion of this issue in the judgments to be delivered today, and consider that they represent both a considerable advance on the discussion in this area to date, and an invaluable resource for further analysis, I believe, as indeed, I think all my colleagues do, that the final resolution of these issues should not be resolved until they arise in an issue which makes it necessary to do so, against the background of concrete facts and fully reasoned and informed argument. This applies particularly to the issue of whether Article 40.6.1.i provides a constitutional privilege for journalists and if so whether it is lesser or greater than, or simply different from, that provided under Article 10 of the ECHR, and in any event, the extent to which any such privilege might be subject to the same or different exceptions. Consequently, I do not wish to now express any view (even preliminary), on the issues discussed and would instead wish to expressly reserve my position on them.