Neutral Citation No: [2024] NICC 39 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **ROO12612** *ICOS No:* *Delivered:* **02/12/2024**

IN THE CROWN COURT OF NORTHERN IRELAND
SITTING AT LAGANSIDE COURTHOUSE, BELFAST

THE KING

v

SEAN FARRELL
and
CIARAN MAGUIRE

Mr Liam McCollum KC and David McNeill (instructed by the Public Prosecution Service) for the Crown
Mr John Larkin KC and Mr Joseph O'Keeffe KC (instructed by Phoenix Law Solicitors) for Sean Farrell
Mr Ivers KC and Seamus McIlroy (instructed by Brentnall Legal Solicitors) for Ciaran Maguire

---

RULING ON THE ADMISSIBILITY OF AGS EVIDENCE

ROONEY J

Introduction

[1] On 4 March 2024, Mr Larkin KC, senior counsel on behalf of Sean Farrell, made a submission that the defence intended to challenge the admissibility of the evidence of members of An Garda Síochána ("AGS") on the basis of alleged breaches of the defendants' constitutional and/or legal rights under the law of the Republic of Ireland.

[2] Mr McCollum KC, senior counsel on behalf of the prosecution, objected stating that no advance notice was given by the defence of the purported challenge to the admissibility of the evidence, the nature of the evidence claimed to be inadmissible and the grounds on which the challenges were based. The court directed the prosecution to file a position paper to address in more detail the issues raised in its objections.

[3] The prosecution produced a position paper dated 8 March 2024. In essence, the prosecution submitted that if the grounds for challenge related to the lawfulness or propriety of the stop, search, arrest and detention of the defendants by members of AGS, together with the seizure of various items, then the prosecution is entitled to receive advance notice as to the precise nature of the evidence sought to be challenged and the legal basis for each challenge to the admissibility of the evidence.

[4] The prosecution further submitted that any challenge to the admissibility of the evidence on grounds of illegality and/or unconstitutionality inevitably required the court's analysis of the relevant statutes and caselaw in the Republic of Ireland.

[5] Pursuant to section 114(2) of the Judicature (NI) Act 1978, the court may take judicial notice of, inter alia, the law of the Republic of Ireland. Alternatively, pursuant to section 114(3) of the Judicature (NI) Act 1978, a person who is suitability qualified to do so on account of his knowledge or experience, is competent to give expert evidence as to the law of any country outside Northern Ireland. In *Deighan v Sunday Newspapers* [1987] NI 105, the judge declined to take judicial notice under section 114(2) and called for expert evidence on a complex point of Irish Law. Accordingly, the prosecution invited the court in this case, to take a similar course and to instruct an expert in Irish criminal and constitutional law.

[6] On 11 March 2024, counsel for Sean Farrell, produced a response to the prosecution's position paper. In summary, it was submitted that the onus is on the prosecution to establish the legality of any deprivation of liberty or interference with property. Also, citing *People (DPP) v JC* [2017] IR 417, it was further submitted that in the Republic of Ireland, the burden rests on the prosecution to establish that evidence was not gathered in circumstances of unconstitutionality or, if it was so gathered, whether it would nonetheless be admitted.

[7] Mr Larkin argued that the defence (otherwise than through the defence statement or as specifically directed by the court) is not required to give the prosecution advance notice as to how it intends to challenge or attack the admissibility of the prosecution evidence. Rather, it is sufficient, after the evidence has been given, for the defence to indicate the evidence they intended to challenge and thereafter to make submissions on the admissibility of that evidence. In the circumstances of this case, without a jury, in order to ensure fairness to the defendants, I granted the application to hear legal arguments on admissibility after the prosecution evidence was heard.

[8] Mr Larkin further submitted that this court is well placed to evaluate and make a determination in relation to Irish law, just as it could in relation to the law in England & Wales.

[9] It was plain to this court that the issues already identified regarding the admissibility of the AGS evidence raised potentially complex matters in relation to

statutory interpretation and the analysis of relevant authorities dealing with illegality and unconstitutionality. Accordingly, I directed on 13 March 2024, that the court would benefit from the opinion and evidence of an expert in Irish criminal and constitutional law. Mr McGillicuddy SC was duly appointed, and the court remains most grateful to him for his expert guidance on Irish law contained in two reports dated 7 May 2024 and 17 May 2024. I will return to the content of these advices later.

[10] At the conclusion of the evidence of the members of AGS, on 21 March 2024, I directed that the defence file skeleton arguments detailing their challenges to the admissibility of the AGS evidence.

[11] The defence team for Sean Farrell, filed a skeleton argument dated 28 March 2024. In summary, the defence challenged the following:

(a) The evidence of the members of AGS who stopped the VW Passat (07-D-7897) in Donegal on 18 June 2015.

(b) The evidence of the members of AGS who searched both the VW Passat (07-D-7897) and the Toyota Corolla (06-WW-1870).

(c) The evidence of the members of AGS who seized the VW Passat on 18 June 2015 and the Toyota Corolla on 24 June 2014.

(d) The evidence of the members of AGS who seized items from the VW Passat and the Toyota Corolla.

(e) The evidence of the members of AGS who arrested and detained Sean Farrell and Ciaran Maguire on 18 June 2015.

(f) The evidence of the members of the AGS who searched and, thereafter, seized clothing from Sean Farrell and Ciaran Maguire.

(g) All evidence related to or derived from the forensic examination of the VW Passat which was seized by AGS on 18 June 2015.

(h) All evidence related to or derived from the forensic examination of the Toyota Corolla vehicle which was seized by AGS on 24 June 2015.

(i) All evidence related to or derived from the forensic examination of gloves found and seized by AGS on 18 June 2015.

[12] In summary, the following submissions were advanced:

(a) The statutory powers invoked by members of AGS were not extraterritorial in nature and, accordingly, they did not have the power to stop, search and arrest the defendants in respect of acts that allegedly occurred outside the

Irish state. Since the exercise of the statutory powers were unlawful and/or unconstitutional, it was claimed that the impugned evidence should be excluded.

(b) Although the exercise of the power of arrest and seizure were purportedly based on a suspicion of IRA membership, there was no conceivable basis for the existence of any genuine suspicion, far less a reasonable suspicion, that Mr Farrell and Mr Maguire were members of that organisation. The powers were also unlawfully exercised in breach of the defendants' constitutional rights under the Constitution of Ireland and, accordingly, the impugned evidence should be excluded.

(c) There was no lawful authority for the evidence, which was obtained in the Republic of Ireland, to be admitted in evidence in Northern Ireland. The proper procedure in order for evidence obtained in the Republic of Ireland (or any country outside the UK) to be lawfully admitted in criminal proceedings in Northern Ireland was for the PPS to send International Letters of Request ("ILORs") to the appropriate authority in the Republic of Ireland under section 7(5) of the Crime (International Co-operation) Act 2003. Even if evidence is obtained under an ILOR, section 9(2) of the 2003 Act provides that the evidence may not be used for any purpose other than that specified in the ILOR without the consent of the appropriate authority in the Republic of Ireland. In the absence of evidence of either the existence of, or compliance with, an ILOR for the admission and use of the evidence, it was submitted that the court should exclude this evidence from the trial.

[13] The defence further submitted that the legal consequence of findings of unlawfulness and unconstitutionality in the securing of evidence in the Republic of Ireland, must mean that the evidence should be excluded by the court pursuant to Article 76(1) of the Police and Criminal Evidence (NI) Order 1989 ('PACE'), which provides as follows:

> "76.—(1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (2) Nothing in this Article shall—
>
> (a) prejudice any rule of law requiring a court to exclude evidence."

[14] The court notes that the defence team for Ciaran Maguire filed a skeleton on 5 May 2024, essentially relying on and supporting the above submissions made on behalf of Sean Farrell.

[15] The said defence submissions on the admissibility of AGS evidence were forwarded to Mr Tony McGillicuddy SC. He was specifically asked to provide an independent opinion on the issues raised in the defence submissions in the context of the relevant evidence from the members of the AGS. Mr McGillicuddy was provided with transcripts of their evidence. As stated, he produced two opinions on 7 May 2024 and 17 May 2024. Throughout both opinions, Mr McGillicuddy was at pains to emphasise that the purpose of his opinion was to assist the court's interpretation of the relevant statues and authorities. However, he maintained and correctly recognised that, at all times, it was for this court to come to its decision on the relevant findings of fact having heard the evidence.

[16] Mr McGillicuddy gave evidence to this court on 9 September 2024 and was cross-examined by Mr Larkin KC on behalf of Sean Farrell and Mr Ivers KC on behalf of Ciaran Maguire.

[17] Following Mr McGillicuddy's evidence, further skeleton arguments on the admissibility of evidence were provided, to include the following:

(a) A note dated 10 September 2024, on behalf of Sean Farrell in relation to the interpretation of section 7 of the Criminal Justice Act 2006.

(b) A prosecution skeleton dated 18 September 2024 in response to the defendants' skeleton arguments dated 20 March 2024 and 5 April 2024 and the evidence and cross-examination of Mr McGillicuddy.

(c) A rejoinder from Sean Farrell's defence team dated 23 September 2024.

(d) A prosecution addendum skeleton argument on the admissibility of evidence obtained through ILORs dated 30 September 2024.

[18] Oral submissions were made by counsel on 1 October 2024. I remain grateful to counsel for their erudite and succinct submissions. The written and oral submissions have been carefully considered by me in this ruling on the admissibility of the evidence of the members of AGS.

[19] I will consider the evidence under the following headings:

(a) The relevant statutory provisions and analysis.

(b) Section 30 of OASA 1939 – Power of arrest: Analysis of the Relevant Criteria.

(c) The arrests of Sean Farrell and Ciaran Maguire.

(d) The evidence of members of AGS who stopped, searched and seized the black VW Passat and who searched the occupants of the said vehicle.

(e) The evidence related to or derived from the detention and search of Sean Farrell and Ciaran Maguire and the seizure of their clothing

(f) The evidence related to or derived from the forensic examination of the black VW Passat.

(g) The evidence related to the seizure and retention of the gloves.

(h) The seizure of the Toyota Corolla and all evidence related to or derived from the forensic examination of the Toyota Corolla.

(i) Requests to foreign states for assistance in obtaining evidence.

(j) The effect of ILORs under CICA 2003 and the admissibility of evidence.

(a) Relevant statutory provisions and analysis

[20] The relevant statutory provisions for consideration in this ruling are detailed by Mr McGillicuddy in his expert analysis at paragraphs [9]-[30] of his advices dated 7 May 2024. I agree with this analysis and consider it appropriate to set them out in full below:

> ***"Membership of an unlawful organisation***
>
> [9] Section 18 of Offences against the State Act 1939 ('OASA 1939') declares that any organisation which engages in one of the following activities is deemed to be an "unlawful organisation" for the purposes of the OASA 1939:
>
> (a) engages in, promotes, encourages, or advocates the commission of treason or any activity of a treasonable nature, or
>
> (b) advocates, encourages, or attempts the procuring by force, violence, or other unconstitutional means of an alteration of the Constitution, or
>
> (c) raises or maintains or attempts to raise or maintain a military or armed force in contravention of the Constitution or without constitutional authority, or

(d) engages in, promotes, encourages, or advocates the commission of any criminal offence or the obstruction of or interference with the administration of justice or the enforcement of the law, or

(e) engages in, promotes, encourages, or advocates the attainment of any particular object, lawful or unlawful, by violent, criminal, or other unlawful means, or

(f) promotes, encourages, or advocates the non-payment of moneys payable to the Central Fund or any other public fund or the non-payment of local taxation."

[10] Section 19 of the 1939 Act further provides that if and whenever the Government is of the opinion that any particular organisation is an unlawful organisation, it may make a "suppression order", declaring that the organisation is an unlawful organisation and ought, in the public interest, to be suppressed. A suppression order is conclusive evidence that the organisation is an "unlawful organisation" for the purposes of the Offences Against the State Acts. A suppression order must be published in Iris Oifigiúil "as soon as conveniently may be" after it is made. The Government may amend or revoke the order at any time.

[11] Section 20 of the 1939 Act allows any person who claims to be a member of an organisation in respect of which a suppression order has been made to apply to the High Court for a "*declaration of legality*" in respect of the organisation. The application may be made within 30 days after the publication of the order in Iris Oifigiúil. If the High Court is "*satisfied*" that the organisation is not an unlawful organisation, then the court may make a declaration of legality in respect of the organisation.

[12] Following that, section 21 of the OASA 1939 provides for the offence of membership of an unlawful organisation. The offence is simply formulated:

> 'It shall not be lawful for any person to be a member of an unlawful organisation.'

[13] There is no definition of "member" or "membership" in the Act. However, the Superior Courts have provided some assistance on the nature of the offence itself by clarifying that the offence is a continuing offence even though the practice of the Director of Public Prosecutions in Ireland is to charge people with being a member of an unlawful organisation on a particular date. *In People (DPP) v Donnelly, McGarrigle & Murphy* [2012] IECCA 78 O'Donnell J stated at paragraphs 16–17:

> '[N]ormally the offence of membership is a continuing offence in the sense that an individual will be a member of an unlawful organisation over a period of time, and ordinarily will continue to be a member as he moves from location to location during that period of time. It is true that the general, although the not invariable, practice is to charge offences of membership as being a member on a particular date within the State, but frequently the evidence will reflect the fact that the allegation against the accused is that he was in fact a member of an unlawful organisation for a period leading up to the date charged and remained and was a member on the date charged.'

[14] In addition, O'Donnell J stated at paragraph 26 that:

> '[m]embership is normally a continuing state of affairs, rather than a single activity, and is accordingly more susceptible to belief evidence of a senior Garda officer, based on a variety of sources over a period of time than if such evidence was admissible in respect of a single criminal activity.'

[15] This reference by O'Donnell J to the belief evidence of a senior Garda Officer concerns the most controversial element of prosecutions for membership of an unlawful organisation, where under section 3(2) of the Offences Against the State (Amendment) Act, 1972 the evidence of belief by a Garda Chief Superintendent that a person is a member of an unlawful organisation is admissible opinion evidence in relation to the offence. Challenges to the

constitutionality of that "opinion evidence" provision have been unsuccessful.

[16] Section 21(3) of the OASA 1939 provides that it is a defence for a person to show that he or she did not know that the organisation was unlawful or that, as soon as reasonably possible after the person became aware of the real nature of such organisation or after the making of a suppression order in relation to such organisation, he or she ceased to be a member thereof and disassociated himself therefrom.

Extra-territorial effect of section 21 of OASA

[17] It is a core principle of Irish criminal law that criminal statutes do not have an extra- territorial effect in the absence of clear statutory authority. That principle was referred to by Fennelly J in the Supreme Court in *F McK v GWD* (Proceeds of crime outside State) [2004] 2 IR 472 at paragraph 31 as follows:

> 'In the absence of a clear and unambiguous contrary indication, there is a presumption that Acts of the Oireachtas do not have extra-territorial effect. Where statutes provide for such effect, this can be clearly seen.'

[18] The Oireachtas has provided that the offence of membership of an unlawful organisation is subject to extra-territorial application in certain circumstances, which means that the conduct of a person outside the State that, if committed in the State, amounted to an offence under S.21 of the OASA 1939 is a criminal offence under the laws of the State in certain circumstances.

[19] Such provision is made in section 6(1)(b) of the Criminal Justice (Terrorist Offences) Act 2005 ('2005 Act'). That Section provides, *inter alia,* that a person is guilty of an offence if the person commits outside the State an act that, if committed in the State, would constitute an offence under section 21 of the OASA 1939 (membership of an unlawful organisation), section 21A of the OASA 1939 (assisting an unlawful organisation), or section 6 of the *Offences Against the State (Amendment) Act 1998* (directing an unlawful organisation).

[20] In general, the act must be one to which any one of the following five scenarios apply, in that the act must have been:

(a) committed on board an Irish ship,

(b) committed on an aircraft registered in the State,

(c) committed by a person who is a citizen of Ireland or is resident in the State,

(d) committed for the benefit of a legal person established in the State,

(e) directed against the State or an Irish citizen, or

(f) directed against an institution of the European Union that is based in the State, or a body that is based in the State and is set up in accordance with the Treaty establishing the European Community or the Treaty on European Union.

[21] The Criminal Justice (Terrorist Offences) Act 2005 also permits the prosecution of an offence where the extraterritorial act falls outside of the list set out above, but only where the DPP is satisfied that extradition of the accused has been refused.

[22] Section 6(6) of the 2005 Act further provides that where a person is charged with an offence under section 6(1) which, in the opinion of the Attorney General, was committed in or outside the State with the intention of (a) unduly compelling the Government of a state (other than a member state of the European Union) to perform or abstain from performing an act; or (b) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of such a state, then no further proceedings in the matter (other than any remand in custody or on bail) may be taken except with the consent of the Attorney General.

[23] Thus, the offence of membership of an unlawful organisation does have an extra-territorial component in certain specified circumstances so that conduct outside the State is subject to the criminal law of the State in certain situations. In other words, a person can be prosecuted before the Irish Courts for an offence of membership of an

unlawful organisation where their acts or conduct occurred outside of the State itself.

[24] Thus, any legal arguments about the nature of the belief(s) held by the arresting Gardaí in May 2015 in this case may be affected by this legal position. Secondly, even if the said arrests were deemed to be unlawful for any reason, if the Irish Courts were then faced with assessing whether any evidence on foot of any such arrests should be deemed inadmissible the existence of this aspect of section 21 of the OASA 1939 would have to be considered in light of any errors by any of the Gardaí in the exercise of their powers.

IRA is an unlawful organisation

[25] The Unlawful Organisation (Suppression) Order, 1939 (S.R. & O. No. 162 of 1939) declares that the organisation styling itself the Irish Republican Army, also the IRA and Óglaigh Na hÉireann, was an unlawful organisation which ought in the public interest to be suppressed.

[26] This outlaw all organisations styling themselves as the IRA, and any attempt to argue to the contrary has been rejected by the Irish Courts. Harrison in her textbook on the Special Criminal Court at paragraph 6.04 states:

> 'It is clear that different labels or adjectives applied to the organisations IRA or the INLA will not have the effect of excluding them from the terms of the suppression orders. In *Ó Brádaigh v Fanning* [Unreported High Court 25 November 1972] Kenny J stated that the effect of the 1939 Order was to make 'both bodies calling themselves the Official IRA and the Provisional IRA unlawful organisations' and that the adjectives 'official', 'provisional', 'continuity' or 'real' could not affect the situation.'

[27] A more recent attempt to re-argue this issue on the basis that the reference to the "IRA" as suppressed in the 1939 orders did not refer to an organisation established in and around 1997 or thereafter in response to the negotiations and conclusion of the Good Friday

Agreement was also rejected at trial, and on appeal to the Court of Criminal Appeal. The argument was advanced in *DPP v Campbell* (Unreported) Court of Criminal Appeal, 19 December 2003, which is reported at 2004 WJSC-CCA 3324, [2003] 12 JIC 1905, 2003 WJSC-CCA 3043.

[28] The Special Criminal Court had rejected this submission in a ruling on 10 October 2001, where it was:

> '…satisfied that the labels such as 'official', 'provisional', continuity' or 'Real' are irrelevant in considering whether a particular person or group of persons are within the ambit of the Suppression Order i.e. that he or they belong to an organisation which styles itself the Irish Republican Army or the IRA or Óglaigh Na hÉireann. The so called 'Real IRA' are on all fours with the original IRA as it existed in 1939 in terms of its philosophy, objectives and structure and members of that group are within the ambit of the Suppression Order of 1939.'

[29] Writing for the Court of Criminal Appeal, McGuinness J upheld that reasoning, and held at pages 11 to 12:

> 'It is, of course, true that there has been violent disagreement and at times internecine struggle between the groups of persons involved over the years. Nevertheless, as stated in evidence by Detective Superintendent Maguire the group of which the applicant was convicted of being a member has 'the structure, style and philosophy exactly the same as all other organisations up to now representing themselves as the Irish Republican Army or Óglaigh Na hÉireann.'

Bearing these considerations in mind this Court is of the view that the Special Criminal Court was correct in its ruling, adopting the decision of Kenny J in *Ó Bradaigh v Fanning* (unreported, 25 November 1972, High Court) that:

> '… the labels such as 'official', 'provisional', continuity' or 'real' are irrelevant in considering

whether a particular person or group of persons are within the ambit of the Suppression Order i.e. that he or they belong to an organisation which styles itself the Republican Army or the IRA or Óglaigh Na hÉireann.'

The court does not find it necessary to consider the argument advanced on behalf of the prosecution that even in the absence of any Suppression Order the IRA would be an illegal organisation within the terms of s.18 of the Offences against the State Act, 1939.

This first ground of appeal therefore fails.

Thus, I consider that there is no substantive basis for arguing before the Irish Courts that an "*unlawful organisation*" in the style of the IRA has not been proscribed as an unlawful organisation by virtue of its supposed establishment after 1997 or at some other subsequent stage. This has been rejected by the Superior Courts in clear terms in *DPP v Campbell*, which I have noted above."

(b) Section 30 of OASA 1939 – Power of arrest: Analysis of the Relevant Criteria

[21] Section 30 of the Offences Against the State Act, 1939 provides, in part, as follows:

"(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…
>
> (4)…"

[22] Sean Farrell was arrested by Garda Hynes under section 30 of the Offences against the State Act 1939 (OASA 1939) on the basis that he suspected that Farrell was a member of an unlawful organisation, namely the IRA and Óglaigh Na hÉireann. Garda McNally arrested Ciaran Maguire under section 30 OASA 1939, on the basis that he suspected that Maguire was a member of an unlawful organisation, namely the IRA. An analysis of the facts which formed the basis of their suspicion and whether that suspicion was reasonably held, will be considered below.

[23] As outlined above, section 30 OASA 1939 provides that a member of An Garda Síochána may, without warrant, arrest any person whom he or she suspects of having committed or being about to commit or being or having been concerned in the commission of an offence under the 1939 Act *or* a scheduled offence; carrying a document relating to the commission or intended commission of any such offence; *or* being in possession of information relating to the commission *or* intended commission of any such offence.

[24] Section 30 of the 1939 Act does not state in express terms that the suspicion required for an arrest under this section must be a reasonable one. Notwithstanding, as advised by Mr McGillicuddy SC, the Irish courts have interpreted that the suspicion must be genuinely held by the arresting officer, and it must be based on reasonable grounds. *State (Trimbole) v Governor of Mountjoy Prison* [1985] IR 550; *DPP v Quilligan* [1986] I.R. 495; *DPP v Tyndall* [2005] IESC 28, [2005] 1 IR 593; *DPP v Quilligan* (No. 3) [1993] 2 IR 305; and *Braney v Ireland* [2021] IESC 7, [2022] 1 ILRM 141.

[25] In *Walshe v Fennessy* [2005] 3 IR 316, Kearns J stated at paragraph [43], the following in respect of an arrest under section 30 OASA 1939:

> "Various authorities, both here and in the United Kingdom, confirm that where a statutory power of arrest of this kind exists, it is the state of mind of the arresting garda or policeman alone which is critical. As was confirmed by this court in the recent decision in *The People (Director of Public Prosecution) v Tyndall* [2005] IESC 28, [2005] 1 I.R. 593, the suspicion does not have to be proved in any particular manner and may be established either by direct evidence or may be inferred from the circumstances. Nevertheless, it is a fact which must be established before an arrest under the section may be regarded as lawful."

[26] In *Walshe*, Kearns J stated further at paragraph [56]:

> "Without in any way trying to fix or lay down a template of what is appropriate in all cases, these authorities clearly demonstrate that the relevant suspicion is that of the arresting officer alone. It is not the arresting officer's subjective belief which is the critical or determining factor. It is a suspicion which, to be found not unreasonable, must find some objective justification from the surrounding circumstances and the information available to the arresting officer. It is a suspicion which in my view may be informed by a direction to arrest given by a superior officer, particularly in the circumstances of this case where the direction must be seen against the background of all the other background circumstances found to have been proven at the time when the direction to arrest was given. Even if a direction alone is never to be taken as sufficient, and I do not wish to be taken as so holding or deciding, **the authorities establish that something quite small** in addition will suffice to constitute the material from which a **bona fide and reasonable suspicion may be formed**. It may be a briefing session or document. It may be hearsay material coming by way of confidential information. It may be no more than a short verbal account given by a superior officer to the officer who will make the arrest. It may also derive and be inferred from the surrounding circumstances as this court recently emphasised in *The People (Director of Public Prosecutions) v Tyndall* [2005] IESC 28, [2005] 1 I.R. 593."**[emphasis added]**

[27] The Supreme Court of Ireland made it clear in *DPP v Cash* [2010] 1 IR 609, the

concept of a reasonable suspicion can arise from information provided to a Garda from a variety of sources, even if some of that material would not be admissible in a subsequent criminal trial of the arrested person. Fennelly J at paragraph [32] quoted the dicta of the trial judge, Charleton J:

> "[12] It has never been held that what would be found a reasonable suspicion in law, requires to be based on the kind of evidence that would be admissible under the rules of evidence during the hearing of a criminal trial. On the contrary, a reasonable suspicion can be based on hearsay evidence or can be inferred from discovering that an alibi which a suspect has given to the police turns out to be false. In *Hussien v Chong Fook Kam* [1970] AC 942 the issue of the parameters of what was a reasonable suspicion came up before the Privy Council in the context of the criminal code of Malaysia. A car was travelling home one night with five people in it when, on passing a lorry, a log fell from that vehicle on to the car. One passenger was killed, and another was injured. The lorry did not stop. A registration number had been obtained which resulted in the arrest of the driver and passenger of the lorry. On questioning, they denied they had driven past the place where the accident had occurred. The Privy Council explained that reasonable suspicion should not be equated with prima facie proof, as that concept is understood in the law of evidence. The police force was entitled to act on a lesser standard of reasonable cause, or reasonable suspicion. Lord Devlin offered the following analysis, at p. 948, which I would follow:
>
> > 'The test of reasonable suspicion prescribed by the Code is one that has existed in the common law for many years. The law is thus stated in Bullen and Leake (3rd ed., 1868), p. 795, the "golden" edition of (1868):
> >
> > > 'A constable is justified in arresting a person without a warrant, upon a reasonable suspicion of a felony having been committed and of the person being guilty of it.'
>
> Their Lordships have not found any English authority in which reasonable suspicion has been equated with prima facie proof. In *Dumbell v Roberts* [1944] 1 All E.R. 326, Scott L.J. said, at p. 329:

> 'The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon before acting to have anything like a prima facie case for conviction; …"
>
> There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. There is a discussion about the relevance of previous convictions in the judgment of Lord Wright in *McArdle v Egan* (1934) 150 LT 412. Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case. Thus, the fact that the accused has given a false alibi does not obviate the need for prima facie proof of his presence at the scene of the crime; it will become of considerable importance in the trial when such proof as there is, is being weighed perhaps against a second alibi; it would undoubtedly be a very suspicious circumstance.
>
> [13] The crucial issue in this case is whether a suspicion arising from a piece of evidence the origin of which is uncertain as to whether it was properly obtained, or arriving from an illegally obtained piece of evidence, destroys the legality of an arrest. In that regard, it is claimed that the prosecution must prove that upon which a reasonable suspicion was founded was lawfully obtained. This argument seeks to import the rules of evidence into police procedures. It has no place there. If the prosecution was obliged to prove legality in respect of every step leading to an arrest or charge, this would have the result that the prosecution, in presenting a case, would be required not only to show, against objection by the defence, that the evidence which they proposed to lead was lawfully obtained, but to open to the court every facet of the investigation to ensure that no illegality ever tainted any aspect of police conduct."

[28] Fennelly J, stated further at paragraph [38]:

> "[38] As Charleton J observed, it has never been held that 'what would found a reasonable suspicion in law, requires to be based on the kind of evidence that would be admissible under the rules of evidence during the hearing of a criminal trial.' Counsel for the accused was unable to refer to any authority to undermine that conclusion…"

[29] In *DPP v Braney* [2021] IESC 7, Charleton J stated at paragraph [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…"

[30] Therefore, the information provided could emanate from many sources. The level of information required to meet the threshold is not high. As stated in *Walsh on Criminal Procedure* (2nd Ed) at paragraph 4.77:

> "…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."

(c) The arrests of Sean Farrell and Ciaran Maguire

[31] In his evidence, Garda Hynes stated that at 3am on 18 June 2015 he received information from the AGS Divisional Communications Room in Letterkenny that an attempt had been made to leave a suspicious device under a PSNI officer's car in Eglinton, Derry, and that three males were observed fleeing the scene in a black Volkswagen Passat with a partial registration 07-D and a silver vehicle with the partial registration 06-WW. Further information was received that these vehicles had driven through a PSNI checkpoint and that they were last sighted heading in the direction of the border crossing at Bridgend, Co Donegal. One of the vehicles was specified to be a black Volkswagen Passat with an Irish registration number 07-D-7897.

[32] Garda McNally, in his evidence, stated that he also received a call from Divisional Communications in Letterkenny that two vehicles, believed to have been involved in the planting of an explosive device at a private home outside Derry, had driven through a PSNI checkpoint in Derry and were heading possibly in the direction of Bridgend, Co Donegal. The initial descriptions of the vehicles were a black Passat and a Toyota Corolla/Astra. A further communication indicated that the black VW Passat had a registration number 07 D 7897 and that the other vehicle was silver with a partial registration number 06 WW.

[33] In their evidence, Garda Hynes and Garda McNally stated that they received further information that the RSU had stopped a black Volkswagen Passat in Killygordon, Co Donegal, and that they were required to provide assistance. Garda Hynes and Garda McNally were in separate cars. When they arrived at Killygordon, Garda Hynes and Garda McNally observed the black Volkswagen Passat stopped on the road with three males handcuffed and face down behind the vehicle. Garda Hynes spoke with Garda Prunty who told him that they had encountered the Volkswagen Passat driving through the village of Killygordon and that the vehicle had driven though a red light. He was also told that the vehicle had been stopped pursuant to section 30 OASA 1939.

[34] Garda Hynes and Garda McNally were present when Detective Kilcoyne informed the males on the ground that they had been stopped under section 30 OASA 1939 for the purpose of a search. Garda Hynes and Garda McNally also heard Detective Kilcoyne ask the males for their names and addresses and informed them that it was an offence to refuse or fail to provide those details. The males refused to give their details. The males were then cautioned and remained silent.

[35] In his direct evidence, Garda Hynes stated that he arrested Sean Farrell under section 30 OASA 1939 for being a member of an unlawful organisation. In cross-examination, Garda Hynes confirmed that the unlawful organisation was the IRA or Óglaigh Na hÉireann. Following further questioning by Mr Larkin, Garda Hynes stated that the IRA was the same organisation that for many years had been involved in the Troubles in Northern Ireland before 1998.

[36] Garda McNally in his evidence specifically stated that from the information relayed to him, he believed that the men on the ground were members of an unlawful organisation, namely the IRA. He then arrested Ciaran Maguire under section 30 OASA 1939 for membership of an unlawful organisation.

[37] As stated above, section 18 OASA 1939 specifies that any organisation which engages in one of the specified activities is deemed to be an unlawful organisation for the purposes of the 1939 Act. Section 19 OASA 1939 further provides that the government may make a "suppression order" declaring an organisation to be unlawful and, in the public interest, to be suppressed. A suppression order is conclusive evidence that the organisation is an "unlawful organisation" for the purposes of the Offences against the State Act. The Unlawful Organisation

(Suppression) Order 1939 declares that the organisation styling itself the Irish Republic Army, also the IRA and Óglaigh Na hÉireann, is an unlawful organisation which ought in the public interest to be suppressed.

[38] In my judgment, Garda Hynes' arrest of Sean Farrell and Garda McNally's arrest of Ciaran Maguire were justified and lawful. Their suspicion that Sean Farrell and Ciaran Maguire were members of an unlawful organisation was bona fide and based on a reasonable interpretation of information they received and their observations prior to the arrest. In reaching this decision, I consider the following to be relevant.

[39] The information relayed to Garda Hynes and Garda McNally emanated from a trustworthy source, namely the Divisional Communications in Letterkenny and the officers would have been entitled to accept the reliability of this information. Based on the details provided, in my judgement, it was reasonable for Garda Hynes and Garda McNally to suspect a connection between the following, namely (a) the planting of the suspicious device; (b) the information that the black Volkswagen Passat was observed fleeing the scene with a partial registration 07-D; (c) the information that the black VW Passat (07 D 7897) and the silver Toyota Corolla/Astra (partial reg 06 WW) were believed to have been involved in the planting of the explosive device; (d) the fact that the Volkswagen Passat with the Irish registration 07-D-7897 had driven through a PSNI checkpoint in Derry; (e) the communication that both vehicles were heading towards the border at Bridgend, Co Donegal.

[40] The act of placing an explosive device under the car of a police officer is consistent with the modus operandi of the IRA in their attempts to kill and/or seriously injure police officers and security personnel. Based on the information received, it was reasonable for Garda Hynes and Garda McNally to suspect that IRA members were involved in planting the device and that they had fled the scene in a black Volkswagen Passat with an Irish registration number 07-D-7897 and a Toyota Corolla/Astra with a partial Irish plate, which had then driven through a checkpoint heading in the direction of the Republic of Ireland.

[41] When Garda Hynes and Garda McNally arrived at the scene in Killygordon, they observed a black Volkswagen Passat, with the same registration number as previously reported. They saw three males on the ground behind the vehicle. Garda Hynes and Garda McNally were justified in their suspicion that those who planted the device in Eglinton and who fled in a Volkswagen Passat were the same males observed by them on the ground behind the said vehicle and were members of an unlawful organisation, namely the IRA.

[42] In legal argument, Mr Larkin sought to persuade the court that a distinction had to be made between the IRA, as an organisation before and after the Good Friday Agreement 1998. Mr Larkin stated that it was clear from the evidence of Garda Hynes that, when he arrested Sean Farrell, in his mind the IRA was the same

organisation which had been involved in the Northern Ireland Troubles before 1998. Mr Larkin submitted that there was no logical basis for connecting the incident in Eglinton (which could not be attributed to the IRA post 1998) and the purported arrest of the defendants.

[43] I reject this argument. Firstly, I agree with Mr McGillicuddy that there is no substance to the argument that the Irish courts would make a distinction between the IRA, which was proscribed as an unlawful organisation before 1998 and the organisation after the Good Friday Agreement.

[44] As stated by Mr McGillicuddy, the Unlawful Organisation (Suppression) Order, 1939 outlaws all organisations styling themselves as the IRA, and any attempt to argue to the contrary has been rejected by the Irish Courts. Harrison in her textbook on the Special Criminal Court at paragraph 6.04 states:

> "It is clear that different labels or adjectives applied to the organisations IRA or the INLA will not have the effect of excluding them from the terms of the suppression orders. In *Ó Brádaigh v Fanning* [Unreported High Court 25 November 1972] Kenny J stated that the effect of the 1939 Order was to make 'both bodies calling themselves the Official IRA and the Provisional IRA unlawful organisations' and that the adjectives 'official', 'provisional', 'continuity' or 'real' could not affect the situation."

[45] As highlighted by Mr McGillicuddy in his advices, a recent attempt to re-argue this issue on the basis that the reference to the "IRA" as suppressed in the 1939 orders did not refer to an organisation established in and around 1997 or thereafter in response to the negotiations and conclusion of the Good Friday Agreement was also rejected at trial, and on appeal to the Court of Criminal Appeal. The argument was advanced in *DPP v Campbell* (Unreported) Court of Criminal Appeal, 19 December 2003, which is reported at 2004 WJSC-CCA 3324, [2003] 12 JIC 1905, 2003 WJSC-CCA 3043.

[46] Mr Larkin, further argued that the events in Eglinton were inadequate to ground a reasonable suspicion for membership of an unlawful organisation in the Republic of Ireland. He stated that it was plain that the stop, search and arrest for membership of an unlawful organisation in the Republic of Ireland was a "colourable device" which was used by the AGS in the absence of a known lawful power to stop and search the vehicles and to arrest the defendants at the relevant time for an alleged offence committed in Northern Ireland. Although an arrest under section 21 of OASA 1939 for the offence of membership of an unlawful organisation was possible, the act in question must satisfy one of the five stipulated scenarios. Mr Larkin argues that since the AGS did not know if one of five scenarios in section 21 was satisfied, the only avenue for the AGS to stop, search and arrest was to use a

power that was grounded in an offence in the RoI jurisdiction rather than the NI jurisdiction. According to Mr Larkin, these circumstances represent a classic use of a "colourable device" by the AGS which has been deprecated by the Irish courts as a deliberate breach of constitutional rights (see *State (Trimbole) v Governor of Mountjoy Prison* [1985] IR 550; *State (Bowes) v Fitzpatrick* [1978] ILRM 195.

[47] On the basis of my analysis above of the relevant facts which gave rise to a reasonable suspicion by the arresting officers that the defendants were members of an unlawful organisation, I reject Mr Larkin's argument that the events were inadequate to ground the necessary reasonable suspicion for membership of an unlawful organisation in the Republic of Ireland. I reject the submission that the arrest pursuant to section 30 OASA 1939 was used as a "colourable device." I do not accept that the constitutional rights of the defendants have been breached with the consequence that any item obtained by AGS and/or PSNI or PPS flowing from the stop, search and arrest of the defendants should be excluded from the evidence before this court.

[48] In conclusion, having carefully considered the power of arrest under section 30 OAPA 1939 and the interpretation of this section by the Irish Courts (see paragraphs [21]–[30] above), it is my decision based on the above analysis of the evidence of Gardai Hynes and McNally that they both genuinely suspected and had reasonable grounds to suspect that the defendants were members of an unlawful organisation and that the arrests of Farrell and Maguire were lawful and did not infringe their constitutional rights.

[49] If I am wrong in my interpretation of the law and the application of the facts to the law, it is my decision that the said evidence is relevant and admissible. Furthermore, having carefully considered all the circumstances, including the circumstances in which the evidence was obtained, it is my decision that the admissibility of the evidence would not have an adverse effect on the fairness of the proceedings. The defence have not put forward any convincing arguments to support unfairness beyond the alleged unlawfulness in obtaining the evidence. Accordingly, I would not be prepared to exercise my exclusionary discretion under Article 76 of PACE.

[50] I also accept the submission of the prosecution that, under Article 76 PACE 1989 (section 78 PACE 1984), there is no burden on the prosecution to disprove allegations of unfairness to the criminal standard, or, indeed, that the concepts of onus and burden of proof have any application in the exercise of the discretion under article 76 (section 78) as stated by Rose LJ in *R(Saifi) v Governor of Brixton Prison* [2001] 4 All ER 168 at paragraph [52]:

> "Section 78 confers a power in terms wide enough for its exercise on the court's own motion. The power is to be exercised whenever an issue appears as to whether the court could conclude that the evidence should not be

> admitted. The concept of a burden of proof has no part to play in such circumstances. No doubt it is for that reason that there is no express provision as to the burden of proof, and we see no basis for implying such a burden. The prosecution desiring to adduce and the defence seeking to exclude evidence will each seek to persuade the court about impact on fairness. We regard the position as neutral and see no reason by section 78 should be understood as requiring the court to consider upon whom the burden of proof rests."

(d) The evidence of members of AGS who stopped, searched and seized the black VW Passat and who searched the occupants of the said vehicle

[51] On 18 June 2015, Garda Prunty and Garda Murphy were attached to the Regional Support Unit ('RSU') at Ballyshannon, Co Donegal. The Regional Support Unit is an armed response unit of the AGS.

[52] At 3:04am, Garda Prunty, who was accompanied by Garda Murphy, received a call from Garda Lavelle in the Communications Room, Letterkenny Garda Station. The information indicated that two vehicles, namely a black VW Passat registration number 07-D-7897 and a silver Toyota Corolla registration number 06-WW-1870 had failed to stop for the PSNI in Derry a short time previously. Gardai Prunty and Murphy were further informed that these vehicles were connected to an incident whereby an explosive device had been placed below an off-duty police officer's private motor car on the outskirts of Derry. The vehicles were last observed heading in the direction of Bridgend, Co Donegal. Garda Prunty indicated to Garda Lavelle that they would respond.

[53] Garda Prunty was the driver and Garda Murphy was the passenger in the marked Garda Support Unit car. On route from Ballyshannon towards Lifford, they observed the black VW Passat coming in the opposite direction. Garda Prunty turned his vehicle and drove back towards Killygordon village where they caught sight of the black VW Passat. The blue lights were activated. Garda Murphy observed the Volkswagen Passat increase its speed as it approached Killygordon village. At the road junction in Killygordon, another vehicle was stopped at a red light. The evidence of both Garda Prunty and Garda Murphy was that the Volkswagen Passat drove through the red light at speed on the wrong side of the road and then continued to drive at excessive speed on leaving Killygordon village.

[54] The Garda vehicle followed the Volkswagen Passat through a sequence of bends. The Passat then slowed down and stopped at Cavan Lower, Killygordon. Garda Prunty positioned the patrol car at an angle to the front of the Passat, thereby preventing any further movement of the vehicle.

[55] Both Garda Prunty and Garda Murphy were armed. Garda Prunty drew his

official issue pistol. Garda Murphy was holding a Heckler and Koch MP7 sub-machine gun.

[56] Garda Murphy went to the driver's side of the Volkswagen Passat. He observed the driver's door open. He identified himself to the occupants as an armed Garda and directed them to make their hands visible and not to move. Garda Murphy states that he was shouting and informed the occupants that they had been stopped under section 30. He continued to shout at them to keep their hands visible and not to move or make any sudden movements.

[57] Garda Prunty states that the occupants raised their hands and made no reply to Garda Murphy. Garda Prunty then opened the rear passenger door of the Volkswagen Passat and told the rear passenger to get out of the vehicle. It was necessary for Garda Prunty to remove the seat belt, and he then directed the rear passenger to get out of the vehicle with his hands raised. The rear passenger was further instructed to go to the rear of the vehicle and lie face down on the road. Handcuffs were placed on the rear passenger. Garda Prunty asked his name, but he remained silent. Garda Prunty stated that he now knows this male to be Sean Farrell.

[58] Garda Prunty then directed the front seat passenger to get out of the vehicle. Garda Prunty asked his name, but he received no reply. This male was subsequently identified as Sean McVeigh. He was placed on the ground at the rear of the vehicle.

[59] Garda Murphy directed the driver to get out of the vehicle and ordered him to lie on the ground. This person was subsequently identified as Ciaran Maguire.

[60] Garda Prunty informed the occupants of the vehicle that they had been stopped under section 30 of the Offences against the State Act for a search. He then cautioned each of them. Garda Murphy then searched the driver, Ciaran Maguire, as he lay on the ground under section 30 OASA. He stated that the search was brief to ensure that there were no firearms or explosives on his person.

[61] Garda Prunty then searched Sean Farrell and Sean McVeigh while they were on the ground under section 30 of the Offences against the State Act.

[62] Garda Murphy then carried out a cursory search of the vehicle for firearms and explosives. He admits that the search was cursory due to the fact that only two Gardai were present. Garda Murphy stated that the search was limited to looking into the vehicle, looking under and on top of the seats. He did not look into the glove compartment. He stated that he may have leaned into the vehicle but did not physically enter it. The search was brief, looking for firearms and explosives. The search was conducted under section 30 OASA. During the search, Garda Prunty maintained cover of the persons on the ground.

[63] Garda Prunty informed Ciaran Maguire, the driver of the VW Passat, that he was seizing the vehicle under section 7 of the Criminal Justice Act 2006. He

remained with the vehicle until it was removed from the scene.

[64] In summary, as detailed above, Garda Prunty and Garda Murphy stated in their evidence that Sean Farrell and Ciaran Maguire were expressly told that the vehicle, namely the Volkswagen Passat in which they were occupants, was stopped by Garda Murphy in the exercise of his power under section 30 OASA 1939. Sean Farrell was searched by Garda Prunty and Ciaran Maguire was searched by Garda Murphy, both officers exercising their powers under section 30 OASA 1939. Garda Murphy stated that the vehicle was searched for weapons and explosives pursuant to section 30 OASA 1939. Garda Prunty seized the vehicle pursuant to section 7 of the Criminal Justice Act 2006.

[65] I have carefully considered the written and oral submissions made on behalf of the defendants and also the prosecution submissions. The power to stop and search a person is contained in section 30(1) of OASA 1939. The power to search a vehicle is contained in section 30(2) of OASA 1939. It is my view, for the reasons given below, the Volkswagen Passat was lawfully stopped and searched pursuant to section 30(2) OASA 1939. Also, the defendants were lawfully stopped and searched under section 30(1) OASA 1939.

[66] Section 30(1) OASA 1939 provides:

> "A member of the Gárda Síochána 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."

[67] Section 30(2) OASA 1939 provides that, in the exercise of any powers as stated in section 30(1), any member of the Gárda Síochána may 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 to arrest without warrant.

[68] Both Garda Prunty and Garda Murphy had received information from a reliable source, namely AGS Communications at Letterkenny, that an explosive device had been placed under the private motor vehicle of a off-duty police officer on the outskirts of Derry and that the two vehicles concerned had failed to stop for police patrols in Derry and were last observed heading in the direction of Bridgend, Donegal. The vehicles were identified as a black Volkswagen Passat registration number 07-D-7897 and a silver Toyota Corolla registration number 06-WW-1870.

[69] Based on this information, in my judgement, Garda Prunty and Garda

Murphy had reasonable grounds to suspect that the occupants of the black VW Passat (07-D-7897) had committed or had been concerned in the commission of an offence under section 30 OASA or a scheduled offence. Garda Prunty stated in his evidence that, based on the information received, "an act of terrorism had been committed against an off-duty police officer." It was entirely reasonable for Garda Prunty to suspect that firearms and explosives were in the vehicle and, in order to search the occupants of the vehicle, it was necessary to stop the VW Passat for that purpose.

[70] Garda Murphy stated in his evidence that after the vehicle came to a halt, he shouted at the occupants that they were being stopped under section 30. He stated further that Garda Prunty also told the three occupants that they were being stopped under section 30 OASA for a search. Garda Murphy stated that he carried out a search of Ciaran Maguire "to ensure that there were no firearms on his (sic) person or explosives." In my judgement, Garda Murphy lawfully exercised his powers under section 30 OASA to stop and search both Ciaran Maguire and the vehicle. Firearms offences are "scheduled offences" for the purposes of section 30 OASA 1939. On the basis of the information that Garda Murphy had received, he had reasonable grounds for suspecting, both that the occupants may have firearms or explosives, and that the vehicle may contain firearms or explosives. When asked what was in his mind at the time of the search, he stated as follows:

> "What was in my mind at the time was that this was an attack on a police officer and obviously it was a terrorist group that done it."

[71] Garda Prunty and Garda Murphy, in directing the defendants to get out of the Volkswagen Passat and ordering them to lie face down on the ground were acting lawfully and under section 30 OASA. Searching the defendants and Sean McVeigh for firearms was lawful and justified under section 30. Garda Murphy's search of the Volkswagen Passat, albeit cursory, was lawful and justified under section 30(2) OASA 1939.

[72] Garda Prunty stated in his evidence that he seized the Volkswagen Passat (07-D-7897) under section 7 of the Criminal Justice Act 2006 ('CJA 2006'). Section 7 CJA provides as follows:

> "(1) Where a member of Gárda Síochána who is in –
>
> (a) a public place, or
>
> (b) any other place under a power of entry authorised by law or in which he or she was expressly or impliedly invited or permitted to be,
>
> finds or comes into possession of anything, and he or she

> has reasonable grounds for believing that it is evidence of, or relating to, the commission of an arrestable offence, he or she may seize and retain the thing for use as evidence in any criminal proceedings for such period from the date of seizure as is reasonable, or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings and thereafter the Police (Property) Act 1897 shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Gárda Síochána in the circumstances mentioned in that Act."

[73] On the basis of the information received by Garda Prunty from Communications in Letterkenny, as detailed above, in my judgement, he had reasonable grounds for believing that the Volkswagen Passat was evidence of or relating to the commission of an arrestable offence. As stated by Mr McGillicuddy in his advices, which I accept, the concept of an "arrestable offence" for seizure under section 7 of the Criminal Justice Act 2006, includes those offences for which there is a power of arrest under the Criminal Law (Jurisdiction) Act 1976, including attempted murder, firearms offences and the offences related to the use of explosive devices. Those offences are "arrestable offences" as they carry a penalty of five years' imprisonment or more.

[74] In his evidence, Garda Prunty specifically stated that power to seize a vehicle under section 7 of the CJA 2006 allows for seizure in relation to the commission of an arrestable offence. During cross-examination, Garda Prunty stated that the attempted murder of a PSNI officer was in his contemplation. However, he also stated that the vehicle was of evidential value in relation to offences that may have also occurred in the Republic of Ireland, and the fact that individuals had been arrested under section 30 OASA. The mere fact that Garda Prunty had several offences in his contemplation, all of which constitute "arrestable offences" does not invalidate the seizure of the VW Passat. For the reasons given above, I do not accept defence counsel's submission that the stop and search of the vehicle and the search of the defendants under section 30 OASA 1939 was a colourable device used by the officers and a deliberate breach of the defendants' constitutional rights.

[75] If I am wrong in my interpretation of the law and the application of the facts to the law, it is my decision that the said evidence is relevant and admissible. Furthermore, having carefully considered all the circumstances, including the circumstances in which the evidence was obtained, it is my decision that the admissibility of the evidence would not have an adverse effect on the fairness of the proceedings. The defence have not put forward any convincing arguments to support unfairness beyond the alleged unlawfulness in obtaining the evidence. Accordingly, I would not be prepared to exercise my exclusionary discretion under Article 76 of PACE.

(e) The evidence related to or derived from the retention and search of Sean Farrell and Ciaran Maguire and the seizure of clothing

[76] Following the arrest of Sean Farrell, Garda Hynes placed him in a patrol vehicle, and he was conveyed to Milford Garda Station arriving at approximately 4:45am. Sean Farrell was introduced to the member in charge at the station, Garda Trasa Heekin. Garda Hynes informed Garda Heekin of the reason for the arrest. During the process, Sean Farrell remained silent. During the search of Sean Farrell, Garda Hynes found a Toyota car key in the pocket of his jacket. The Toyota key was handed to Garda Heekin. Garda Hynes seized Mr Farrell's clothing pursuant to section 7 of the Criminal Law Act 1976. The clothing was labelled and placed in two evidence bags. The clothing was as follows: a cap labelled KH1; a jacket labelled KH2; a navy hoodie labelled KH3; a white T-shirt labelled KH4; blue jeans labelled KH5; a pair of white socks labelled KH6, and a pair of Adidas runners labelled KH7. The evidence bag was handed to Sergeant McWalters.

[77] During the search of Sean Farrell, Garda Hynes stated that he was wearing gloves.

[78] Following the arrest of Ciaran Maguire, he was placed in a patrol vehicle and taken to Letterkenny Garda Station. Ciaran Maguire was introduced to the member in charge, namely Garda Enda Glennon. The reasons for the arrest were specified.

[79] Ciaran Maguire initially remained silent and declined to give his name despite the direction from Garda McNally under section 30 of OASA. Exercising authority under section 7 of the Criminal Act 1976, Garda McNally seized the prisoner's outer coat and placed it into a nylon bag, then into a brown evidence bag which was sealed and handed to Sergeant McWalters. This exhibit was labelled MMW1. The following items were also seized from Ciaran Maguire, namely a beige pair of runners and socks which were placed in a brown evidence bag and labelled TMCM1; a pair of blue jeans which were placed in a brown evidence bag and labelled TMCM2; a blue T-shirt which was placed in a brown evidence bag and labelled TMCM3. These exhibits were then handed to Garda Gerry Fee.

[80] Garda McNally also seized from Ciaran Maguire an empty plastic glove bag which was labelled TMCM4 and another empty plastic glove bag which was labelled TMCM5. These exhibits, namely TMCM4 and TMCM5 were handed to Garda Gerry Fee at Letterkenny Garda Station.

[81] The items taken from Sean Farrell (DOC19-DOC26) were taken to FSNI and examined for the presence of explosive residues. Nothing of significance was detected.

[82] Items taken from Ciaran Maguire (DOC6, DOC07, DOC08, DOC09, DOC10

and DOC30) were brought to FSNI and examined for the presence of explosive residues. A quantity of RDX was found on Ciaran Maguire's blue jeans (DOC06) and the hooded jacket (DOC30). The weight to be attached to the forensic findings will be considered at a later stage.

[83] Pursuant to sections 30(3) and (4) of OASA 1939, a person arrested under section 30 of OASA may be detained in a Garda Station or other place for up to 24 hours and, thereafter, the period of detention may be extended in the following circumstances. Firstly, the extension may be granted by a member not below the rank of Chief Superintendent. Such extension may be authorised only if the member has a bona fide suspicion that the detainee was involved in the offence for which he or she was arrested. A further 24-hour extension may be authorised by a judge of the District Court. The judge may issue a warrant for further detention only if satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation has been conducted diligently and expeditiously.

[84] Having considered the circumstances of the defendants' detention, it is my decision, that the detention of Farrell and Maguire was lawful.

[85] As detailed in *DPP v Braney* [2021] IESC 7, the powers which a Garda can exercise in relation to an arrested person under the Criminal Justice Act 1984 are the same as those which can be exercised in relation to a person arrested and detained under section 30 of OASA 1939. In other words, once the person has been lawfully arrested and is detained at the Garda station under 30, forensic samples can be taken from him. He could also be subject to a search at the Garda station under section 30(5) of OASA 1939 and/or section 7 of the Criminal Law Act 1976.

[86] Both Garda Hynes and Garda McNally stated that they invoked their powers under section 7 of the Criminal Law Act 1976 when they searched the defendants and thereafter seized and retained their clothing for testing. Garda Hynes also specifically invoked section 7 of the Criminal Law Act 1976 when he searched Sean Farrell and seized and retained the Toyota key which was found in his jacket.

[87] Having carefully considered the evidence, it is my decision that Garda Hynes and Garda McNally lawfully exercised their powers under section 7 of the Criminal Law Act 1976 in searching the defendants and seizing the said items from them. The defendants were informed by Garda Hynes and Garda McNally that they were exercising their powers under section 7 of the Criminal Law Act 1976. In my judgment, there has not been a breach of the defendants' constitutional rights in the search and seizure of the said items, to include the Toyota key found in the possession of Sean Farrell.

[88] The evidence in relation to the forensic examination of the items seized is relevant and properly admissible. As stated above, the weight to be attached to the forensic testing and the results of the forensic examination is a matter for further

consideration at a later stage.

[89] In the event that my interpretation of the law and the application of the facts to the law is flawed, it is my decision that the said evidence is relevant and admissible. Furthermore, having carefully considered all the circumstances, including the circumstances in which the evidence was obtained, it is my decision that the admissibility of the evidence would not have an adverse effect on the fairness of the proceedings. The defence have not put forward any convincing arguments to support unfairness beyond the alleged unlawfulness in obtaining the evidence. Accordingly, I would not be prepared to exercise my exclusionary discretion under Article 76 of PACE.

(f) The evidence related to or derived from the forensic examination of the black VW Passat

[90] As stated above Garda Prunty seized the VW Passat pursuant to section 7 of the Criminal Justice Act 2006. According to the evidence of Detective Garda McMonigle, he remained with the vehicle until the arrival of Aiden Harrold who loaded it onto a recovery truck. Responsibility for preserving the vehicle was handed over to Garda Heneghan who, together with Garda Carr, escorted it to a secure lock-up premises at Harold's Yard, Ballybofey, Co Donegal. The compound was securely locked. From 5:25am until 7:25am, Garda Heneghan preserved the vehicle until he was relieved by Garda Dunne, who in turn, remained outside the locked compound until Garda Coyle, Scenes of Crime Unit, entered the secured shed at 12:50. At 1:30pm, Garda McLaughlin, Scenes of Crime Unit, also entered the secured shed. Garda Coyle carried out forensic swabbing of the vehicle. Garda McLaughlin carried out fingerprint examination. Both Garda Coyle and Garda McLaughlin left the shed at 3:30pm. The shed was locked by Garda Dunne. At 3:50pm, Garda McCrossan, Search Team, entered the shed and left at 4:30pm, when the shed was again locked.

[91] The initial forensic examination of the VW Passat was carried out by Garda Coyle, CSI, who was attached to the Letterkenny Divisional Crime Scene Investigation Unit. In his evidence, Garda Coyle stated that he put on a white PPE suit before he commenced the examination of the Volkswagen Passat. He then took a number of samples from the vehicle, seized various items and put them into nylon bags. The items included the fitted carpet mat from the driver's front footwell (KC16), the fitted carpet mat from the passenger front footwell (KC17), the fitted carpet mat from the driver's rear footwell (KC18) and the fitted carpet mat from the passenger's rear footwell (KC19). The items (Exhibits KC2 to KC24) were placed in separate nylon bags and labelled accordingly. On 18 June 2015, the exhibits were handed to Garda O'Connell, the Exhibits Officer. Exhibits KC2 to KC24 were placed in an evidence bag and logged collectively as Exhibit DOC33. The false vehicle registration plates (KC25 and KC26) were placed in a paper evidence bag and logged as DOC34. K1, the master copy CD of the photographs and working copy of the technical examination of the black Passat was logged as Exhibit DOC34 and DOC35.

[92] The sealed nylon bags KC16 and KC17 containing the carpet map from the driver's front footwell and the mat from the passenger's front footwell were logged as Exhibits DOC38 and DOC39 respectively.

[93] On 24 June 2015, a number of items were received at the Forensic Science Northern Ireland (FSNI) from Detective Garda O'Connell, AGS, to include items attributed to VW Passat 07-D-7897, namely Exhibits DOC38, DOC39, DOC40 and DOC41.

[94] Forensic examination revealed that the presence of RDX explosive residue in respect of the driver's front footwell mat (DOC38) and the passenger's front footwell mat (DOC39). The weight and cogency of this evidence is a matter for analysis and consideration at a further stage.

[95] Having carefully considered the above, I am satisfied that the evidence in relation to and derived from the forensic examination of the VW Passat by members of AGS was lawful and that continuity of the evidence had been properly preserved. The evidence is plainly relevant and admissible.

[96] The VW Passat was further examined by Michael Hannigan, CSI, attached to PSNI on 11 September 2015. This examination took place at Harold's Yard, Ballybofey. He swabbed the vehicle for traces of explosive material using a swab kit (serial number 202). This item was then handed to Garda O'Connell at Harold's Yard, who packaged and labelled it MDH1. He also took a number of photographs. The disc was labelled MDH2.

[97] Forensic testing of the swabs taken from the interior door handles, front passenger seat and the rear seat revealed traces of RDX explosives. The cogency of these results and the weight to be attached to them will be subject to consideration at a later stage.

[98] It is my decision at this stage of the proceedings that all evidence from the AGS related to or derived from the forensic examination of the black VW Passat was lawfully obtained and is properly admissible. The results from the forensic testing are also properly admissible. For the avoidance of any doubt, this includes all the items presented to FSNI from AGS to include fingerprint swabs, DNA swabs and fibre testing from the vehicle.

[99] If I am wrong in my interpretation of the law and the application of the facts to the law, it is my decision that the said evidence is relevant and admissible. Furthermore, having carefully considered all the circumstances, including the circumstances in which the evidence was obtained, it is my decision that the admissibility of the evidence would not have an adverse effect on the fairness of the proceedings. The defence have not put forward any convincing arguments to support unfairness beyond the alleged unlawfulness in obtaining the evidence.

Accordingly, I would not be prepared to exercise my exclusionary discretion under Article 76 of PACE.

(g) The evidence relating to the seizure and retention of the gloves

[100] Detective Inspector O'Donnell, Gardai Prunty and Murphy, Detective Garda McGonigle and Detective Garda Kilcoyne, conducted a foot search of the road from the arrest scene to a point in the road approximately two miles back from where Gardai Prunty and Murphy first encountered the VW Passat at Killowen.

[101] During this search, six gloves were located at different locations. Detective Garda Kilcoyne used his GPS location device on his tetra radio to identify the specific location at which each glove was found. The locations were recorded by Detective Garda McGonigle. Detective Inspector O'Donnell photographed each glove in situ.

[102] Detective Inspector O'Donnell showed Detective Garda McGonigle two latex gloves which he had been preserving on the grass verge and roadway. Detective Garda McGonigle placed the first latex glove from the grass verge into an envelope and labelled it POD1. He then placed the second latex glove from the roadway into an envelope and labelled it POD2.

[103] Three gloves were found by D/Inspector O'Donnell on the grass verge and roadway closer to Killygordon village. Detective Garda McGonigle placed a left-hand Wurth Tigerflex glove into an envelope and labelled it POD3. He then placed an inside out rubber glove from the grass verge into an envelope and labelled it POD4. Detective Garda McGonigle then placed a right-hand Wurth Tigerflex glove from the roadway into an envelope and labelled it TK1.

[104] An inside out rubber glove which Garda Prunty found lying on a footpath was placed by Detective Garda McGonigle into an envelope and labelled JP1.

[105] I have not received any submissions challenging the identity of the member of the AGS who seized the gloves. It is clear to me from the evidence of Detective Garda McGonigle that no other officer at the scene, apart from Detective Garda McGonigle, handled the gloves. He stated in his evidence that from the location at which a glove was found, he placed the glove into a separate envelope. On each occasion, before he lifted the exhibit, he stated that he changed his gloves and then placed the exhibit into an envelope.

[106] Detective Garda McGonigle stated that the six envelopes containing the six glove exhibits were then placed into his locker. At 8:30am he placed the envelopes into a nylon bag and sealed it with a cable tie and handed it to Detective Garda O'Connell (Exhibit DOC 43)

[107] Neither Detective Garda McGonigle nor any other member of AGS referred to their powers to seize and retain the gloves. This is not surprising. It was plainly

logical for the AGS to retrace the route taken by the VW Passat from the point when it was stopped to where it was intercepted by the RSU in order to investigate the possibility that items would have been discarded from the suspect vehicle. There is no requirement for any officer to inform the defendants that gloves had been found on this route and the basis for the seizure of the gloves. In my judgement, Detective Garda McGonigle had reasonable grounds to believe that the gloves were capable of constituting evidence of, or relating to the commission of an arrestable offence and he was justified in seizing and retaining them for use as evidence in any criminal proceedings. As stated, Detective Garda McGonigle was aware that, following pursuit by the RSU, the three occupants of the VW Passat had been arrested under section 30 OASA 1939 and that three sets of gloves had been located on the two-mile stretch of the road from Killygordon to the locus of the arrest.

[108] Furthermore, in his evidence, Detective Garda McGonigle said he had received information that the occupants of a car were suspected of leaving an explosive device under the vehicle of a PSNI officer, and that the car, which was in convoy with another car, had failed to stop at a PSNI checkpoint on the Foyle Bridge, Derry. He was also told that the car had been registered to a garage in Dublin. When he came to the scene, a black VW Passat (07-D-7897) had been stopped by the RSU. The occupants were lying face down on the ground behind the vehicle. Detective Garda McGonigle specifically stated in his evidence that "the suspicion at the time was that they may have been engaged with explosives." Therefore, for this reason also, Detective Garda McGonigle had reasonable grounds to believe that the gloves were capable of constituting evidence of, or relating to the commission of a scheduled offence and he was justified in seizing and retaining them for use as evidence in any criminal proceedings.

[109] Detective Garda O'Connell, who received the gloves, delivered them to FSNI where they were received and subsequently examined by Isla Fraser, Senior Scientific Office. DOC43 consisted of six gloves which were designated gloves A-F for examination purposes. Glove A (POD1) and glove B (POD2) were white latex gloves. Gloves C (POD3) and glove E (TK1) were right and left grey fabric gloves (Wurth Tigerflex) for the left and right hand respectively. Gloves D (POD4) and glove F (JP1) were black rubber "marigold" type gloves for the left and right hand respectively. DNA findings from Dr Doak, Forensic Scientist, from profiles created by Isla Fraser revealed DNA matching Sean Farrell's profile on the inside of the left and right Wurth Tigerflex gloves, namely items POD3 and TK1 respectively. DNA profile obtained from the inside of the right Tesco marigold type glove (JP1) matched Ciaran Maguire's DNA profile.

[110] The gloves were also examined for presence of explosives. Traces of RDX explosives were found on the left and right Tesco marigold type gloves, namely items POD4 and JP1.

[111] The weight to be attached to the DNA evidence and the forensic examination of the gloves for traces of RDX explosives will be considered at a further stage in the

proceedings.

[112] It is my decision, at this stage of the proceedings, that the evidence from the seizure and retention of the gloves, and further results from the forensic testing of the gloves is properly admissible. In my judgment, there is no evidence that the said evidence was obtained unlawfully or unconstitutionally.

[113] If I am wrong in my interpretation of the law and the application of the facts to the law, it is my decision that the said evidence is relevant and admissible. Furthermore, having carefully considered all the circumstances, including the circumstances in which the evidence was obtained, it is my decision that the admissibility of the evidence would not have an adverse effect on the fairness of the proceedings. The defence have not put forward any convincing arguments to support unfairness beyond the alleged unlawfulness in obtaining the evidence. Accordingly, I would not be prepared to exercise my exclusionary discretion under Article 76 of PACE.

(h) The seizure of the Toyota Corolla and all evidence related to or derived from the forensic examination of the Toyota Corolla

[114] On 24 June 2015, when on patrol in Lifford, Detective Garda Ahern discovered a grey Toyota Corolla, registration number 06-WW-1870 parked behind a bus shelter. He said in his evidence that An Garda Siochana were actively looking for this vehicle because it formed part of an investigation relating to the arrest of three men on suspicion of membership of the IRA. Detective Garda Ahern said that the arrest of the three men had followed an incident that took place in Northern Ireland on 18 June 2015.

[115] In his evidence, Detective Garda Ahern stated that he seized the grey Toyota Corolla under section 7 of the Criminal Justice Act 2006 "on suspicion that it may have been involved in an arrestable offence" and "for the purposes of examination."

[116] In cross-examination by Mr Larkin, Detective Garda Ahern accepted that he was aware that three male persons had been arrested under section 30 OASA 1939 on 18 June 2015. Mr Larkin put to Detective Garda Ahern that the power under section 7 of the 2006 Act depended on the continuing validity of section 30 OASA which, according to Mr Larkin, expired when the defendants were released without charge. Detective Garda Ahern expressly rejected this proposition on the basis that, even if the defendants had been released without charge, the investigation was continuing.

[117] In my judgment, the seizure of the Toyota Corolla by Detective Garda Ahern was lawful, and furthermore that the evidence relating to or derived from the forensic examination of the vehicle is properly admissible. The Toyota Corolla was located in a public place. It can reasonably be inferred from the information Detective Garda Ahern had received in relation to the events that occurred in Northern Ireland on 18 June 2015 and the ongoing investigation, that he had reasonable grounds to

believe that the Toyota Corolla was evidence relating to the commission of at least one of the offences specified in the Schedule to the Criminal Law (Jurisdiction) Act 1976, namely attempted murder and/or the possession of explosives. Also, Detective Garda Ahern was also aware that the defendants had been arrested under section 30 OASA 1939 on suspicion of membership of an unlawful organisation, namely the IRA. Detective Garda Ahern had reasonable grounds to believe that the Toyota Corolla was evidence of, or relating to the commission of this arrestable offence and, therefore, was justified in seizing the vehicle. The fact that the defendants had been released from custody did not vitiate the lawfulness of the seizure under section 7 of the 2006 Act. As stated by Detective Garda Ahern, the investigation was continuing, and he was authorised by the legislation to retain this vehicle as evidence until the conclusion of any criminal proceedings.

[118] On 24 June 2015, the Toyota Corolla was removed by a transporter to Harold's Yard, Ballybofey, and placed in a secure storage shed. The evidence of the AGS was that the shed remained locked and that no one entered the shed until Garda Kevin Coyle, Crime Scene Investigator, and Sergeant McWalters entered to carry out an examination of the vehicle on 25 June 2015 at 10:28am.

[119] On 18 June 2015, following a search of Sean Farrell, a Toyota car key had been seized and secured in a tamper proof evidence bag. On 25 June 2015, Sergeant McWalters used this key to open the seized Toyota Corolla vehicle (06-WW-1870) for the purposes of a forensic examination by Garda CSI Kevin Coyle. During the course of his examination of the vehicle, Garda Coyle seized, *inter alia*, the floor mat from the driver's side front footwell (KC28), the floor mat from the passenger side front footwell (KC29), the floor mat from the driver's side rear footwell (KC30) and the floor mat from the passenger side rear footwell (KC31). Garda Coyle placed these exhibits in separate sealed nylon bags. Sergeant McWalters took wet and dry swabs from the internal door handles, steering wheel, gear knob, handbrake, seat belts and starter button. Garda Coyle also took tape lifts from various locations inside the vehicle (exhibits KC32-KC43). On 6 July 2015, Garda Coyle handed exhibits KC28-KC43 to Garda Donal Callaghan.

[120] The said exhibits were brought to FSNI and examined by Samuel Baird, Forensic Scientist. Exhibits KC28, KC29, KC30 and KC31 were examined for the presence of organic explosive residues such as PETN, RDX and NG. A quantity of RDX (15.37ng) was found on the front passenger footwell floor mat (KC29), nothing of significance was detected on any of the other mats.

[121] On 11 September 2015, while wearing full PPE, Ms McGuigan, Crime Scene Investigator, attached to PSNI, carried out a CDR examination of the Toyota Corolla vehicle in Harold's Yard, Ballybofey, Co Donegal. CDR swabs were taken from the steering wheel, glove box, boot area, front passenger footwell, rear nearside footwell, rear offside footwell and the middle row of seats. Exhibit GMG1 was passed to Detective Garda Daniel O'Connell, who then transported it to FSNI. On forensic examination for the presence of organic explosives, a quantity of RDX was found on

the swabs from the glove box and the front passenger footwell. Nothing of significance was detected on the swabs from the other areas in GMG1.

[122] The cogency of the results from the above forensic testing and the weight to be attached to them will be the subject of consideration at a later stage.

[123] It is my decision, at this stage of the proceedings, that all the evidence from the AGS related or derived from the seizure of forensic examination of the Toyota Corolla (06-WW-1870) was lawfully obtained and is properly admissible. The results from the forensic testing are also properly admissible. For the avoidance of any doubt, this includes all the items presented to FSNI from AGS in respect of the examination and testing of the said vehicle.

[124] If I am wrong in the preceding analysis and conclusion, in my judgement, there has been no breach of the defendants' constitutional rights under the law of the Republic of Ireland.

[125] If there is a flaw in my analysis of the defendants' legal and constitutional rights, on the facts of this case, it is my decision that the said evidence is relevant and admissible. Furthermore, having carefully considered all the circumstances, including the circumstances in which the evidence was obtained, it is my decision that the admissibility of the evidence would not have an adverse effect on the fairness of the proceedings. Accordingly, I would not be prepared to exercise my exclusionary discretion under Article 76 of PACE.

(i) Requests to foreign states for assistance in obtaining evidence

[126] Sections 7-9 of the Crime (International Co-Operation) Act 2003 (CICA) deal with requests to obtain evidence from abroad in relation to a prosecution or investigation taking place in the UK. These provisions develop and expand on section 3 of the Criminal Justice (International Co-Operation) Act 1990, which they replace.

[127] Both prosecutors and defendants may ask a court to make a request to a foreign state for assistance in obtaining evidence. Section 7(1) provides that if it appears to a judicial authority in the UK on the application made by a person mentioned in section 7(3) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and that proceedings in respect of the offence have been instituted or that the offence is being investigated, the judicial authority may request assistance in obtaining evidence abroad. The assistance that may be requested is assistance in obtaining outside the UK any evidence specified in the request for use in the proceedings or investigation (section 7(2)).

[128] Section 7(3) provides that the application may be made in relation to England & Wales and Northern Ireland, by the prosecuting authority and, where proceedings

have been instituted, by the person charged in those proceedings.

[129] Section 7(5) provides that a designated prosecuting authority may itself request assistance under section 7 if it appears to the authority that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and the authority has instituted proceedings in respect of the offence in question or it is being investigated. The Attorney General for Northern Ireland and the Director of Public Prosecutions for Northern Ireland are designated prosecuting authorities pursuant to the Crime (International Co-Operation) Act 2003 (Designation of Prosecuting Authorities) Order 2004.

[129] The UK is party to numerous bilateral and multilateral Mutual Legal Assistance (MLA) treaties. However, there is no requirement for an MLA treaty to exist between the UK and the Requested State to make a request under section 7 of CICA. Where a treaty does exist, this will form the legal basis for requesting assistance and should be cited in the Letter of Request (LOR).

[130] Section 7(2) refers to the request being for "any evidence … for use in the proceedings or investigation." Section 51(1) provides that "evidence" includes information in any form and articles and giving evidence includes answering a question or producing any information or article. Therefore, the request for assistance need not be for admissible evidence.

[131] There are no statutory provisions prescribing the contents of a LOR. In the UK, CPS guidelines exist relating to the proper approach to be adopted with respect to LORs issued under the provisions of CICA 2003. No such guidelines exist within this jurisdiction. In *Re Rea's Application for Judicial Review* [2015] NICA 8, Coghlin LJ stated at paragraph [26]:

> "We note that the Serious Fraud Offices "Guide to Obtaining Evidence from UK" was considered by the court in *J P Morgan Chase Bank National Association and Others v The Director of the Serious Fraud Office and Others* [2012] EWHC 1674 (Admin), [2012] All ER (D) 128 (Jun) and The Mutual Legal Assistance Guidelines issued by the Secretary of State were discussed in *Ismail v Secretary of State for the Home Department* [2013] EWHC 663 (Admin), [2013] All ER (D) 281. The creation and publication of appropriate guidelines for this type of application might well assist designated authorities, practitioners and individuals likely to be affected by the exercise of the powers afforded by the 2003 Act in this jurisdiction bearing in mind that Article 8, as a qualified right, attracts the "quality of law" requirements of the Convention."

[132] It is clear from the said guidelines, that in order to be effective, the LOR must be as specific as possible about the circumstances of the case together with a description of the evidence or material or other assistance required. Also, the purpose for which the evidence or material or other assistance is required and the relevance of the assistance to the investigation of proceedings must be clearly specified.

[133] Pursuant to section 8(1) of CICA, a request for assistance under section 7 may be sent directly to a court exercising jurisdiction in the place where the evidence is situated or to the authority recognised by the government of the country in question as the appropriate authority for receiving requests of that kind.

[134] Section 9 of CICA 2003 applies to evidence obtained pursuant to requests for assistance under section 7. Section 9(2) places a restriction on collateral use of the evidence. The evidence may not, without the consent of the "appropriate overseas authority", be used for any purpose other than that specified in the request. The appropriate overseas authority means the authority recognised by the government of the country in question as the appropriate authority for receiving requests of the kind in question (section 9(6)).

(j) The effect of ILORs under CICA 2003 and the admissibility of evidence

[135] The defence argue that pursuant to sections 7-9 of CICA 2003, an ILOR is required in order to seek assistance in obtaining evidence from abroad. Furthermore, it is argued that an ILOR is required in order to authorise access by the UK police to another country to further or assist in the investigation in the UK. In support of this argument, the defence refers to the ACPO document, "Practice advice on European Cross-border Investigations" (2012) and paragraphs 15.1.2, 15.2.1 and 15.2.2 regarding the requirements in respect of deployment overseas to further a UK investigation.

[136] Since, according to the defence, the prosecution has not produced in this case any ILOR to include any requests for authorisation for access by the police to the Republic of Ireland ('RoI'), forensic samples obtained by PSNI from their travels into the RoI, were unlawfully obtained and are inadmissible in these proceedings. The defence claim that the forensic samples include the following:

(a) Samples taken by Gemma McGuigan, CSNI, from the Toyota Corolla at Harold's Yard, Ballybofey, Co Donegal on 11 September 2015, which was then taken to FSNI by Garda O'Connell, and which formed the basis of the findings of Mr Baird;

(b) The samples taken by Michael Hannigan, CSNI, at Harold's Yard, from the VW Passat on 10 September 2015 and transported to FSNI on 14 September 2015 and which form the basis of the findings of Mr Baird.

(c) The DNA samples.

[137] It is clear to me that, pursuant to the analysis above of sections 7-9 of CICA 2003 above, the purpose of an ILOR is to request assistance and to obtain evidence in circumstances where an offence has been committed or there are reasonable grounds for suspecting that an offence has been committed. Whether the prosecuting authority has complied with the said sections can only be ascertained after an inspection of the ILOR.

[138] The prosecution argues that there is no requirement to disclose ILORs, describing them as "administrative steps to secure the attendance of witnesses and the production of real evidence at a trial." The prosecution argues that the legal authorities are clear that ILORs are confidential between the requesting and requested states (*NCA v Abacha* [2016] 1 WLR 4375 at paragraphs [36]-[44] and *ZXC v Bloomberg LP* [2019] EWHC 970 at paragraphs [19]-[23]. Furthermore, the prosecution argues that there is no legal authority to support the proposition that the prosecution must prove ILORs to rely on evidence secured by that route. It is stated that the only issue touching on admissibility is the manner in which the evidence was obtained, not the steps taken by the prosecution to secure the evidence for the trial.

[139] Mutual Legal Assistance and Letters of Requests are methods of co-operation between states for obtaining assistance in the investigation or prosecution of criminal offences. Letters of Requests are formal and confidential documents. This is recognised in the 2015 Home Office Guidance *Requests for Mutal Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom* ("the MLA Guidelines").

[140] In *National Crime Agency v Abacha* [2016] EWCA Civ 760, the Court of Appeal reviewed the status of requests for MLA in an appeal against a refusal to order inspection of a particular MLA request. Gross LJ (with whom Hamblen LJ and Sir Colin Rimmer agreed) explained the special status of Letters of Request and other requests for MLA:

> "[36] The importance of MLA is well explained in the introduction to the [MLA Guidelines] …
>
> 'MLA … is the formal way in which countries request and provide assistance in obtaining evidence located in one country to assist in the criminal investigations or proceedings in another country. Due to the increasingly global nature of crime, MLA is critical to promote proceedings and ensuring justice for victims of crime. The UK is committed to assisting investigative, prosecuting and judicial authorities in combating international crime and is able to provide a wide range of

MLA'.

[37] The guidelines treat confidentiality as forming part of MLA:

"**Confidentiality**

It is usual policy for central or executing authorities to neither confirm nor deny the existence of an MLA request, nor disclose any of its content outside government departments, agencies, the courts or enforcement agencies in the UK without the consent of the requesting authority. Requests are not disclosed further than is necessary to obtain the co-operation of the witness or other person involved.

…

In general, requests are not shown or copied to any witness or other person, nor is any witness informed of the identity of any other witness. In the event that confidentiality requirements make execution of a request difficult or impossible, the central authority will consult the requesting authorities. In cases where disclosure of a request or part thereof is required by UK domestic law in order to execute the request, it will normally be the case that the requesting authority will be given the opportunity to withdraw the request before disclosure to third parties is made."

[39] The courts have upheld claims to confidentiality in this area…

[40] In *R (Evans) v Director of the Serious Fraud Office* [2002] EWHC 2304 (Admin); [2003] 1 WLR 299, the US authorities sent a letter of request to the Secretary of State for mutual assistance in the investigation of a serious fraud. That assistance involved obtaining evidence and information from members of an English firm of accountants, who were not themselves under suspicion. The matter was referred to the Director of the Serious Fraud Office and the solicitors for the accountants sought access to the letter of request. Access was refused, on the basis that it was by treaty a confidential document, but the Director provided detailed information as to the US investigation, based on the letter of request. Giving the lead judgment in the Divisional Court, Kennedy LJ said this (at [12]):

> '…having regard to the Treaty obligations it is right to start from the position that the letter of request is not a disclosable document, but justice must be done to those who are the subject of a section 2 notice pursuant to a letter of request and the consequential request from the Secretary of State to the Director of the Serious Fraud Office…. The needs of justice can normally be met, as in this case, if when a request is made for disclosure of the letter of request, information is given as to the nature of the criminal investigation, but in some cases the requirements of justice may require more…"

[141] After reviewing a number of other authorities in which the status and confidential nature of Letters of Request (usually in the context of an application for disclosure of the relevant request and requiring the court to balance the interests of justice in a particular case with the confidentiality that attach to Letters of Request), Gross LJ summarised the confidentiality interest:

> "[48] I accept that it is right to start from the position that letters of request such as the request are confidential. Both the Treaty and the Guidelines are clear in this regard. This Court is of course anxious to assist the requests of friendly foreign countries for MLA, both as a matter of comity and on the very practical basis that it is only by furnishing such assistance that international crime and large-scale corruption can be combated. In many cases, there will be very good reasons for maintaining the confidentiality of such requests; examples are readily to hand - such as national security (when it arises), investigations at an early stage, a proper reluctance to disclose what lines of inquiry are being followed and which individuals are under suspicion."

[142] In a criminal trial, the interests of justice and fairness to the accused are paramount. Accordingly, in my view, if so requested, the ILOR must be disclosed to the court exercising its supervisory function, which is normally the disclosure judge.

[143] The provisions of sections 7-9 of CICA 2003 are clear, namely that when making a request for assistance, the designated prosecution authority is required to show that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed. The designated authority must also show that it has instituted proceedings in respect of the offence in question or the

offence is being investigated. This is a matter for the disclosure judge.

[144] This court does not seek to underestimate the confidential nature and content of the Letters of Request. In many cases, there may be justifiable reasons for maintaining the confidentiality of the request, for example, in the interests of national security or, as stated in *NCA v Abacha*, when investigations are at an early stage and there is a proper reluctance to disclose potential lines of enquiry and the identities of any individuals under suspicion.

[145] However, the potential harm from disclosure of the request must be balanced against the interests of justice and maintaining a fair hearing. In many cases, these competing interests can be served by disclosure of the Letter of Request which has been suitably redacted to safeguard the mechanism for Mutal Legal Assistance generally, the need to protect state to state communications and to alleviate potential prejudice to the trial process.

[146] Accordingly, returning to the circumstances of this case, I would direct that the ILORs are provided to the disclosure judge, Kinney J. It will be for Kinney J to make a determination, having reviewed the ILORs, as to whether sections 7-9 of CICA have been complied with. Without prejudice to his overall assessment of the documents, I would respectfully suggest that Kinney J should consider the following:

(a) Whether it appears on the application for the ILOR made by the DPP that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed and that proceedings in respect of the offence have been instituted or that the offence has been investigated. (See section 7(1) and (2) CICA 2003).

(b) Whether, as stated in section 7(2) CICA 2003, the assistance that may be requested is for "any evidence specified in the request for use in the proceedings or investigation". Section 51(1) of CICA 2003 interprets evidence as including "information in any form and articles and giving evidence includes answering a question or producing any information or article."

(c) Whether section 9 of CICA 2003 applies in respect of the evidence obtained pursuant to a request for assistance under section 7 and whether restrictions have been placed on the use of such evidence. Under section 9(2), evidence may not without the consent of the "appropriate overseas authority" be used for any purpose other than that specified in the request. The appropriate overseas authority means the authority recognised by the government of the country in question as the appropriate authority for receiving requests of the kind in question (section 9(6)). The effect of this provision is to render inadmissible in evidence material obtained under section 7 in any criminal or civil proceedings other than those explicitly specified in the Letter of Request (see *XYZ (Liquidator of ABC Ltd) v HM Revenue and Customs* [2010] EWHC 1645 Ch).

[147] As stated in *Nicholls, Montgomery and Knowles on The Law of Extradition and Mutual Assistance (3rd Edition)* at paragraph 18.32:

> "The fact that evidence has been obtained pursuant to a request under section 7 does not *per se* render it admissible at trial. Evidence which has been obtained in breach of any relevant MLAT may be inadmissible. Also, the normal criminal rules of evidence apply to material obtained under a letter of request. Therefore, hearsay evidence will be inadmissible unless one of the exceptions to the hearsay rule is applicable…."

[148] Subject to Kinney J's review of the ILORS in this case and a determination from him that there has not been a breach of sections 7-9 of CICA, if the evidence obtained pursuant to the requests in the ILOR is the same evidence which I have considered above, then, for the reasons given above, it is my decision that the said evidence is relevant and properly admissible. Specifically, in relation to the DNA evidence, the forensic samples taken by Ms McGuigan and Mr Hannigan, if requests were made and authorisation was granted, then such evidence is admissible, to include also the expert forensic reports emanating from the evidence and samples.