***Tallon v DPP*| Columbia Global Freedom of Expression**

**Case Analysis #2**

***Meta-Data*:**

* **Case Number**: 2020/867 JR
* **Corresponding Law Reference**: N/A
* **Date of decision**: 31 May 2022
* **Featured case**: N/A
* **Region**: Europe and Central Asia
* **Country**: Ireland
* **Type of expression**: Public Speech
* **Judicial Body**: First Instance Court (High Court of Ireland)
* **Type of law**: Criminal law
* **Main Themes**: Political Expression
* **Outcome**: Decision- Procedural Outcome
* **Status**: Closed
* **Tags**: Political Expression, Political Speech

***Analysis:***

* **Summary & Outcome**

The High Court of Ireland’s decision in Tallon v Director of Public Prosecution marks an important beginning for the protection of rights of free speech and expression as guaranteed under Article 40.6.1(i) and Article 40.3.1 of the Constitution. The case concerned Mr. Tallon’s preaching on Wexford Street, which resulted in the imposition of a civil order issued by the District Court based on an anti-social behavior in regards to s. 115 of the Criminal Justice Act. The matter pertained to the restraining of the constitutional rights of freedom of political expression and autonomous commination. Judge Phelan construed that the order issued was disproportionate, and the anti-social behavior order infringed the rights to equality before law and right to freely communicate of the applicant.

* **Facts**:

On August 31, 2020, the Wexford District Court passed a civil order against the appellant Stephen Tallon in regard to [s. 115 of the Criminal Justice Act, 2006](https://www.irishstatutebook.ie/eli/2006/act/26/section/115/enacted/en/html#sec115). The order followed five Adult Behaviour Warnings for instances which occurred between June and July 2020, the instances referred to ““excessively loud preaching and commentary which caused interference and caused distress to people working in the vicinity of the Bull Ring and members of the public passing by”, “excessively loud preaching … causing persistent alarm, distress and intimidation to the public passing by”, “excessive loud and aggressive public speaking which caused annoyance and concern for the public and business owners in the vicinity”, “loud and continuous preaching of a very homophobic nature which was very upsetting for the members of the public, passers-by and business owners in the area..” [p. 12]

The District Court's decision was entirely supported by the “benefit of” [p 13] testimony of nine civilian witnesses and six An Garda Sochána (AGS) witnesses. There was no legal representation on part of the applicant. According to the evidence presented, the applicant's preaching was homophobic, anti-religious, and racist in nature and had affected the enjoyment of persons working around Bull Ring. The civil injunction issued in response to this evidence prohibited and barred the Applicant from speaking in public or recording anything within the vicinity of Wexford Town.

On November 2, 2020, the applicant made an appearance in front of the District Court again, on account of four separate charges, including two violations of the previously passed civil order in accordance with [s. 117 of the 2006 Act](https://www.irishstatutebook.ie/eli/2006/act/26/section/117/enacted/en/html). After the issuance of the said order, the applicant had left court and returned to the Bull Ring to engage in his public speaking. The applicant was brought to the court and charged for breaching the order in accordance with s. 117 (1) (b) of the Act without “reasonable excuse.” [p 16] The other two charges centred on the applicant's attendance at the same location with a sign that was deemed to violate Sections 7 and 8 of the Criminal Justice (Public Order) Act of 1994, and the signs were referred as, “threatening, abusive, insulting or obscene with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace might have been occasioned.” [p.17] The first incident took place on 31 August 2020 and the subsequent one on 19 September 2020.

On November 2, 2020, the applicant was tried based on the evidence presented and found guilty on all counts in accordance with s. 117 (1) (b), “with the offences under [s. 7](https://www.irishstatutebook.ie/eli/1994/act/2/section/7/enacted/en/html#sec7) and [s.8](https://www.irishstatutebook.ie/eli/1994/act/2/section/8/enacted/en/html#sec8) of the [Criminal Justice (Public Order) 1994 Act](https://www.irishstatutebook.ie/eli/1994/act/2/enacted/en/html?q=Criminal+Justice+Public+Order+1994+Act&years=1994),” [p 20] and sentenced to eight months of imprisonment.

The applicant filed an appeal in the Circuit Court where the appeal was stayed on grounds of pending judicial review of the matter.

* **Decision Overview**:

Justice Siobhán Phelan delivered the judgment on May 31, 2020.

*Parties’ Submissions*

*Applicant:*

The main concern for the applicant is with the order passed which cannot be construed “necessary” [p 32] due to the part that it extends beyond what “is required to ensure continuation of anti-social behaviour in that the civil order made prohibits any form of public speaking.” [p 32] The applicant construes that the civil order made “criminalizes” [p 32] expression as the order does not provide clarity for interpreting what can be classified as anti-social. The applicant refers to his rights under the constitution which guarantee freedom of speech and expression (public speaking and signing), which further require “equality of treatment before the law.” [p 32]

On behalf of the applicant, it was argued that any civil order issued under section 115 that forbids anti-social behaviour must be interpreted as prohibiting behaviour of the same kind that has been determined to be anti-social and cannot properly extend to activities that people are entitled to under the Constitution but which have not themselves been found to be anti-social. Emphasis was also focused on the fact that the applicant was accused of violating a rule prohibiting "public speaking" while singing, which was inoffensive in and of itself. According to the applicant, s. 115 of the 2006 Act allows the District Judge the authority to issue a civil injunction preventing the exercise of a constitutional right and further allows for an inadmissible interference with fundamental rights including freedom of expression ([Article 40.6.1](https://www.irishstatutebook.ie/eli/cons/en/html#part13)) and the right to equality ([Article 40.1](https://www.irishstatutebook.ie/eli/cons/en/html#part13)) by outlawing actions that would not be illegal if carried out by someone not subject to a similar order.

The “conviction on foot of the civil order” [p 36] as per the applicant has violated his right to equality as the conduct perceived by the Prosecuting Guard and the District Court for which the applicant was convicted does not result in a criminal sanction if it were carried by anyone else. The applicant made a reference to “AG v. Cunningham [1932] 2 IR 28; King v. AG [1981] IR 233; [Dokie v. DPP [2011] IEHC 110](https://www.courts.ie/viewer/pdf/0eef572a-360f-49a8-a8c1-ea72ceae48e6/2011_IEHC_110_1.pdf/pdf#view=fitH), [Douglas v. DPP [2017] IEHC 248](https://www.bailii.org/ie/cases/IEHC/2017/H248.html) and [Terminiello v. Chicago 441 US Supreme Court](https://tile.loc.gov/storage-services/service/ll/usrep/usrep337/usrep337001/usrep337001.pdf) to further support his contentions.”

According to the conviction orders issued by Judge O'Shea of the Wexford District Court on November 2, 2020, and the civil order issued by Judge Cheatle on August 31, 2020, the applicant requested a certiorari order.

*Respondents*

*First Named Respondent*

The contentions drawn by the counsel for the First Named Respondent referred to the improper constitution of the proceedings. The respondent referred to [Brady v. Revenue Commissioners & Ors. [2021] IECA 8](https://www.bailii.org/ie/cases/IECA/2021/2021IECA8.html) and cited that as “matter of first principles” [p 38] without the Court whose ruling was being contested being a party to the proceedings, a certiorari petition could not be filed in a form that would be legally effective, and the appropriate remedy would be appeal. The respondent placed further emphasis on cases as [E.R. v. DPP [2019] IESC 86](https://www.bailii.org/ie/cases/IESC/2019/2019IESC86.html); [Sweeney v. District Judge Fahy [2014] IESC 50](https://www.bailii.org/ie/cases/IESC/2014/S50.html) ; [Farrelly v. Devally [1998] 4 IR 76](https://www.bailii.org/ie/cases/IEHC/1996/5.html) and; [Doyle v. Judge Connellan & DPP [2010] IEHC 287](https://www.bailii.org/ie/cases/IEHC/2010/H287.html) and contended that the role of the Court in judicial review does not extend to evaluating evidence on non-constitutional grounds and also that it does not serve as a Court of Appeal.

*Second and Third Named Respondent*

For the first part, the respondents raised procedural concerns presented to the court. In addition to the procedural challenges, the respondents contended that the applicant’s behaviour showcased that he did not intend to comply with the civil order by any possible means. Further emphasis was called upon by the respondents on the manner of the applicant’s speech and the court was requested to consider the transcript hearing of August 31, 2020.

The respondents contended that evidence calling on the anti-social behavior was “irrelevant” [p 45] where the evidence directly leads to the breach of the civil order. According to the respondents’ submissions, “it is non-compliance with the terms of this order which constitutes an offence, not necessarily the recurrence of anti-social behaviour.” [p 45]

To the effect of s. 115 and s. 117, the respondents submitted that the District Court was vested with a “statutory jurisdiction to injunct behaviour and render the breach of the injunction order a criminal offence.”[p 46] It was further drawn that using injunctive powers might result in the violation of constitutional rights, and that the injunction of the High Court restraining the exercise of the constitutional right of the District Court would be unconstitutional itself.

In lieu of the applicant’s right to freedom of expression, the respondents contended that this “right is not an unlimited or absolute right.” [p 48] The interference of the civil order with the applicant’s right to expression was a “legitimate constraint.” [p 48] The respondents referred to [Murphy v. IRTC [1999] 1 IR 12](https://hudoc.echr.coe.int/eng?i=001-61207) to indicate that the order issued by the District Court was constitutionally valid as it was confined to Wexford and to the form of public speaking

*The Court’s Findings*

Judge Phelan has indicated that there is no “lack of candour in the presentation of relevant facts and circumstances” [p 60] in a manner that would otherwise support the High Court's decision to decline to consider the merits of the judicial review case.

The Court has identified the substance under various parameters and reasoned in accordance thereby.

*Complaint that Proceedings Improperly Constituted*

Judge Phelan believes the reasoning and justification offered by the Court of Appeal in [M v. M [2019] IECA 124](https://www.bailii.org/ie/cases/IECA/2019/CA124.html) is preferable because it is more in line with the text of the regulation itself. The Court also believes that the grievances of the applicant were directed to the substantive issues raised in the order passed and not to the manner in which the proceedings were conducted.

The Court finds that the respondents submissions which referred to [A v. Governor of Arbour Hill [2006] 4 IR 88](https://www.bailii.org/ie/cases/IESC/2006/S45.html) is out of the context of what the applicant intends to seek, which is challenging the validity of the order made “within time and in the manner provided by law.” [p 83]

The Court is satisfied that “sufficient observance of the procedural requirements of O.84 r. 22(2A)(c) RSC as regards service and the constitution of the proceedings” [p 77] is evidenced which can permit the Court to determine the substantive issues at stake and “pursue by way of judicial review [p 92]

*Vires of the Civil Order and Consequential Conviction pursuant to Section 117 of the 2006 Act*

*A Broad but not Unfettered Power*

The Court construes that the District Court Judge did not exceed the jurisdiction which necessitates the determination whether the “statutory provisions which vest jurisdiction in the District Judge withstand constitutional scrutiny.” [p 95]

The main argument put forth by the applicant was that the civil order issued by the District Court Judge was unconstitutional in the way that the power was not used that was compliant with the Constitution in light of the applicant's rights under “[Articles 38.1 and/or 40.1 and/or 40.3 and/or 40.4 and/or 40.6](https://www.irishstatutebook.ie/eli/cons/en/html#article40) of the Constitution.” [p 96] The alternative argument made by the applicant is that sections 115 and 117 are unconstitutional because they are irreconcilable with the same constitutional clauses and that section 115 cannot be interpreted in a way that is constitutionally compliant.

The Court further states that even if the requirements of the court’s statutory limits are met and the procedures are complied with, the court is not working within its jurisdiction in the case if the person who is accused in this case is also denied any of his fundamental rights to justice during a criminal trial, the case referred to the State (Healy) v. Donoghue [1976] IR 325.

The Court holds the significance in the fact that the “anti-social behaviour extends to non-criminal activity” [p 101] due to the involvement of the Gardai and “potentially the criminal process in an area which is otherwise the preserve of the civil process.” [p 101] The Court in lieu of the definition of “anti-social behaviour” in combination with the lower evidentiary standards in the requirement of application process potentially gives rise to “an unwarranted interference with individual rights inhering in people, such as the Applicant, whose views or behaviours are unpopular and even distasteful or discriminatory but not criminal.” [p 104] The Court further states that such behaviours can constitute a civil wrong in cases and not a wrong at all in law in other cases. And thus the Court construes that for the District Court in exercising a jurisdiction under Part 11 of the 2006 Act, due care must be taken to ensure that the broad authority granted to the Court is used within the boundaries of a constitutional interpretation of the Act.

*Due Course of Law*

According to the Criminal Law (Jurisdiction) Bill, 1975 [1977] I.R. 129 at p.152 of the report, cited in King v. AG [1981] I.R. 233, 241, which was referenced by Judge Phelan, the expression "due course of law" demands a fair and just balance between the enjoyment of individual liberties and the demands of an ordered society.

The provisions of the civil order established by reference to the actual evidence presented before the District Court that led to the issuing of the Order do not, in the Court's opinion, satisfy the standards of legal certainty inherent in the protection of the applicant's due process rights. The provisions of the civil order cover behaviour “found to be anti-social to encompass behaviour which is not legally objectionable.”[p 109] The Court further points that an order “tailored to the behaviour” [p 109] addressed in the evidence could have specifically identified the constraints of what can be regarded to constitute as anti-social behaviour.

Judge Phelan notes that, in light of the circumstances as proved by the evidence in this case, the civil order in this instance does not adhere to these requirements. Singing was not included in the District Court's testimony, which focused instead on abusive, loud, relentless, and violent remarks. In addition to outlawing loud, persistent, aggressive, and insulting speech, the civil order goes considerably further and forbids any public speaking. The Court does not believe the provisions of the civil order established by reference to the evidence presented before the District Court which led to the issuance of the order satisfy the standards of “legal certainty inherent in the protection of the applicant’s due process.” [p 109] The Court further notes that the terms of the civil order are “impermissibly vague and uncertain,” and refers to the case of Dokie v. DPP [2011] 1 IR 805. In addition, the offence as construed by the civil order lacks the specificity to be constituted as a criminal offence and potentially be used to actions that have not been determined to be anti-social on evidence presented in the District Court.

*Principle of Equality before the Law inherent in concept of Justice*

Judge Phelan has reasoned that a “broadly drawn civil order” [p 111] towards the criminalisation of the behaviour in a way not substantiated and presented before a Court allows the violation of justice through the infringement of right to equality principle before the law, as provisioned under Article 40.1 by way of which the civil order extends the reach of the criminal law to the applicant and not others who are engaging in similar manner, thereby interfering with the rights of the applicant.

On the breach of the civil order, the Court also construes that “without there necessarily being any recurrence of precisely the same behaviour that has been adjudged as anti-social offends concepts of justice recognised in decisions of the Superior Courts in cases such as King v. AG, where the where the previous findings of a court as to the character or conduct of the Applicant were identified as features which require meticulous care to ensure that a person is not convicted except upon clear and unmistakeable evidence that he has committed the particular offence charged against him and without the requirement for satisfactory evidence of criminal wrongdoing .” [p 112]

*Restriction on Fundamental Right to Communicate and the Proportionality Test*

Judge Phelan has ruled that the civil order in this case prohibits speech, and imposes a restriction on it. The Court refers to [Murphy v. IRTC [1999] 1 IR 12](https://www.bailii.org/ie/cases/IEHC/1997/71.html) where “the right to communicate and to express opinion is a fundamental right (at p. 24).”[p 116] The Court further highlights Article 40.3 and Article 40.6 which enshrines the guarantee by the States to defend and respect rights of individuals including “rights to freedom of expression of convictions and opinions.”

The Court adds that the sentence for imprisonment (sanction of detention) for breaching the civil order poses potential challenges for the “principle of proportionality which requires that the penalty be proportionate to the circumstances of the offence.” [p 122] The Court further rules that there is no evidence which leads to the notion that the applicant’s behaviour actually caused an offence to passer-by or any other individuals and “he was prosecuted for breach of the civil order simpliciter,” [p 122] which go beyond the needed requirement and thereby stands to fail a proportionality test [p 123]

The Court is convinced that the civil order is overbroad and was drafted in violation of the District Judge's authority granted under the 2006 Act as a result.

*Whether the Power is Hopelessly Broad*

According to Judge Phelan, the civil order is not properly made in accordance with s. 115(1)(b) or in accordance with the requirements of proportionality because it interferes excessively with the applicant's constitutionally protected rights, such as his due process rights (due to their ambiguity and overreach) and his freedom of opinions and speech. The Court also notes that the civil order made does not have “the precision and the clarity required to create a criminal offence and is overly broad in its terms by criminalising in an arbitrary and vague manner behaviour when carried out by the Applicant which is otherwise lawful.” [p 130] The Court is satisfied that the civil order was exercised in a manner that did not discern the jurisdicitional parameters of the District Court which consequently resulted in an “unconstitutional interference with the applicant’s rights.” [p 131]

*Vires of the Orders made under Sections 7 & 8 of the Criminal Justice (Public Order) Act, 1994*

The Court held that there was no constitutional challenge to s. 7 and s.8 of the Criminal Justice (Public Order) Act, 1994, and in so far upheld the conviction for the public order offences.

Opinion of Judge Phelan

The Judge has ruled that the weak evidentiary proof needed by law for prosecuting behaviour, as in this case a subject of a civil order has allowed for the risk of “unwarranted interference with personal rights associated with the broad definition of anti-social behaviour.” [p 135] The Court ruled that the “standards of fairness inherent in the concepts of constitutional justice and equality before the law,” were not fulfilled when a civil order under s. 115 has been framed in a way that goes beyond the scope of the harm of anti-social behaviour as evidenced before the District Court which has also treaded onto the “legal and constitutionally protected areas of human activity.” [p 136]

The Court ruled that the District Judge exceeded his jurisdiction as vested under [Part 11 of the 2006](https://www.bailii.org/ie/legis/num_act/2006/0026.html#id1152029037.72) Act. And similarly, as the order was not properly constructed, it has resulted in the “a disproportionate interference with the applicant’s personal rights including his right to equality before the law and his right to freely communicate.” [p 136]

And as such the Court has stated that the orders which were made under “s. 115 and 117 of the 2006 Act are ultra vires and should be quashed.” [p 136]

***Direction:***

* **Outcome**: Expands Expression
* **Information**:

The judgment delivered focuses on freedom of democratic expression which Mr. Tallon was engaged in, and as such the way which the applicant attempted to communicate his views on matters of public interest and concern. This right to freedom is guaranteed under Article 40.6.1 (i) as means for allowing public activity of a citizen in a democratic society to which democratic expression is upheld. Though the courts have not fully recognized this, this judgment marks a potential new beginning.

***Perspective***:

* **Outcome**: (Pursuant to the note on the Style Guide, Pg. 23).
* **Related International and/or regional laws**:
* **National law or jurisprudence**:
* **Other national law or jurisprudence**: N/A.

***Significance***:

* **Significance:** The decision establishes a binding or persuasive precedent within its jurisdiction.
* **Related Cases**: Self-generated.
* **Date updated**:

***Documents:***

* **Official Case Documents**:

<https://www.bailii.org/ie/cases/IEHC/2022/2022IEHC322.html>

* **Reports, Analysis, and News Articles**:

<https://inforrm.org/2022/07/07/case-law-ireland-tallon-v-dpp-political-expression-autonomous-communication-and-anti-social-behaviour-orders-eoin-odell/#more-52666>