



Journalistic privilege in Ireland

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ABSTRACT

Legal protection for confidential journalist sources has often been a site of tension and dispute between journalists, the police and the courts. Journalists routinely claim that freedom of expression guarantees provided for under international and domestic human rights instruments include a legal privilege against disclosure of confidential journalist sources. This claim is often raised to resist compelled disclosure of journalistic materials to police as part of criminal investigations. Courts in many jurisdictions have forcefully repudiated this legal claim, though many recognise some right for journalists to refuse disclosure. Some courts have reluctantly conceded to the naming of this right as ‘journalistic privilege’.

In 2020, courts on both sides of the Irish border were called upon to vindicate this right against disclosure. This recent flurry of litigation has, in the Republic of Ireland, built upon more than a decade of significant legal developments around ‘journalistic privilege’. These latter developments have dramatically expanded the scope of the Irish Constitution’s freedom of expression guarantees.

This article critically reviews this last decade of significant legal developments around ‘journalistic privilege’ in the Republic of Ireland. It examines the two recent and highly significant Irish determinations from 2020 in *Fine Point Films* and *Corcoran*, and how the former Northern Irish judgment has created significant new avenues for legal development in the Republic of Ireland. The article also identifies and considers some important, emergent themes in Strasbourg’s article 10 jurisprudence: specifically an apparent new ‘source motive’ test for article 10 protection of confidential source material.

Keywords: journalistic privilege; confidential source protection; article 10 ECHR; article 40.6.1^o Bunreacht na hÉireann; media freedom; police powers.

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INTRODUCTION

In 2020, appeals courts north and south of the Irish border were called upon to consider the question and scope of ‘journalist privilege’ in two strikingly similar cases. In *Fine Point Films*¹ and *Corcoran*² the High Courts of Northern Ireland and the Republic of Ireland (hereinafter ‘Ireland’) were each faced with journalistic challenges to police seizure of property during court-authorised searches of their workplaces and homes. Both cases drew heavily upon the article 10 jurisprudence of the European Court of Human Rights (ECtHR) regarding confidential source protection and adapted and applied it within the specific procedural regimes governing court authorisation of police searches. *Corcoran* also added significantly to the evolving judicial debate around the scope of journalist source protection under article 40.6.1^o, Bunreacht na hÉireann 1937: Ireland’s principal human rights instrument.

Yet, despite the many similarities between the cases, these courts came to quite different conclusions. The Northern Ireland High Court in *Fine Point Films* offered a full-throated endorsement of the need for an *overwhelming public interest* to pierce the European Convention on Human Rights (ECHR) article 10 corollary *right* of confidential source protection.³ By contrast in *Corcoran*, whose hearings immediately followed and considered *Fine Point Films*, the High Court in Ireland saw judicial ambivalence towards an assertion of ‘journalist privilege’, continuing a long and consistent trend in Irish (and other common law)⁴ courts.

Corcoran was, however, appealed to the Irish Court of Appeal in 2022. In this subsequent *Corcoran*⁵ decision, the Irish Court of Appeal overturned the High Court judgment and adopted the approach of the Northern Irish court in *Fine Point Films*. Like *Fine Point Films*, the Court of Appeal judgment sets out a number of important principles governing ‘journalistic privilege’ in Ireland. The judgment also fired a significant warning shot to the Oireachtas regarding the potential for findings of unconstitutionality against aspects of the Irish warrant-granting regime. In June 2023, the Irish Supreme Court unanimously

1 *In Re Fine Point Films & Others* [2020] NICA 35.

2 *Corcoran v An Garda Síochána* [2020] IEHC 382.

3 See eg *Goodwin v United Kingdom* (1996) 22 EHRR 123 and *Financial Times Ltd v United Kingdom* (821/03) [2010] EMLR 21.

4 Janice Brabyn, ‘Protection against judicially compelled disclosure of the identity of news gatherers’ confidential sources in common law jurisdictions’ (2006) 69 *Modern Law Review* 895; and Jeffrey Nestler, ‘The underprivileged profession: the case for Supreme Court recognition of the journalist’s privilege’ (2005–2006) 154 *University of Pennsylvania Law Review* 201.

5 *Corcoran v An Garda Síochána* [2022] IECA 96.

endorsed the Court of Appeal's judgment in *Corcoran*, and rejected an appeal by An Garda Síochána.⁶

These recent Irish judgments raise a number of distinct, yet inter-related, complex issues for both Irish constitutional law and European (and Northern Irish) human rights law. The article begins by examining the significant developments around 'journalist privilege' in Ireland, where the issue of confidential source protection has been vented and explored by appellate courts on a number of occasions during the past decade and a half. It then considers the High Courts' judgments in *Fine Point Films* and *Corcoran* and their implications for journalist privilege on both sides of the Irish border, with a particular emphasis on the latter's novel development of Irish constitutional protections for publishers. The article then sets out and critically reviews the most recent of the three cases examined here, the Court of Appeal judgment in *Corcoran*. The article concludes by outlining and analysing some shared emergent themes in journalist source protection on the island of Ireland and sets out the key legal principles that appear to govern both legal regimes.

This article provides a comprehensive critical re-evaluation of the history of journalistic privilege in Ireland at a highly significant moment in its development. The article also provides a number of novel theoretical insights into 'journalistic privilege' in Ireland. In particular, the article examines and theorises a decades-long tension between Ireland's judicial branch and its news media regarding which institution sits at the apex of constitutional importance in safeguarding Irish democracy. This issue has, I demonstrate, played out most explicitly in cases where claims of 'journalistic privilege' were at issue. It also draws attention to related emergent trends in the European Court of Human Rights' article 10 jurisprudence, particularly what I describe as a new 'source motive' test for confidential source protection. This article strongly argues this previously critically unexamined line of Strasbourg authority may have significant implications for crime-reporting journalism in Europe.

6 *Corcoran v An Garda Síochána* [2023] IESC 15.

DEVELOPMENT OF ‘JOURNALIST PRIVILEGE’ IN THE REPUBLIC OF IRELAND: ‘WHO DECIDES’ AS A DEMOCRATIC CONSTITUTIONAL IMPERATIVE

No special status for news media: article 40.6.1^o and the scope of the ‘administration of justice’

While the Irish Constitution expressly provides liberty of expression for journalists and news media under article 40.6.1^o,⁷ journalists seeking a corollary right of source confidentiality protection (*qua* ‘privilege’) have had mixed treatment in the Irish courts. Beginning in *Re O’Kelly*,⁸ the Court of Criminal Appeal delivered a robust ‘administration of justice in the courts’⁹-centred interpretation of article 40.6.1^o that dismissed the defendant’s claims that it might afford journalists a distinct set of protections. While article 40.6.1^o might protect the ‘education of public opinion’ work of journalists because of that work’s contribution to the ‘common good’, Walsh J determined these protections did not extend to any special right of non-disclosure of source materials, let alone the seeming absolute privilege asserted by various journalists’ codes of ethics.¹⁰

So far as the administration of justice is concerned the public has a right to every man’s evidence except for those persons protected by a constitutional or other established and recognised privilege.¹¹

The court in *Re O’Kelly* concluded that there was no ‘established and recognised’ privilege for journalists in Irish law. Journalists, like any other ordinary citizen, were obligated to disclose information to a court that required it. Not only was there no ‘privilege’ against disclosure, journalists could not expect any additional leeway from the courts despite the asserted necessity of confidential source networks in their work.

This reference to the ‘administration of justice’ in *Re O’Kelly* hints at the expansive borders of judicial power the Irish courts have carved out under article 34.1. *Re O’Kelly* was also decided soon after *Murphy v Dublin Corporation*.¹² While not a ‘journalist privilege’

7 Carolan notes the unique pedagogic function the provision envisages for news media. Eoin Carolan, ‘The implications of media fragmentation and contemporary democratic discourse for “journalistic privilege” and the protection of sources’ (2013) 49 *Irish Jurist* 182.

8 (1974) 108 ILTR 97.

9 See art 34.1, *Bunreacht na hÉireann* 1937.

10 See eg the National Union of Journalists, ‘Code of Conduct’.

11 *Re O’Kelly* (n 8 above).

12 [1972] IR 215. This connection was identified by Simons J in *Corcoran* [2022] (n 5 above) [35].

case, the Supreme Court in *Murphy* had similarly ‘emphasised that the decision as to the compellability of the production of evidence is a matter for the *judicial power*’.¹³ These ruminations – repeated again in later Irish judgments – on the proper sphere of judicial authority when repudiating the asserted ‘journalist privilege’ might lead some to believe that this is a dispute within the Irish Constitution’s separation of powers doctrine.¹⁴ This would certainly be a novel approach: one that might afford journalism an enhanced constitutional status, on a par with the executive, legislative and judicial branches of government. Indeed, such a position may have some textual support. Article 40.6.1^o itself refers to various news media as ‘organs’: in this case ‘organs of public opinion’. This is a distinctive label in the 1937 Constitution, only afforded to the three recognised branches of government, institutions representing the state in international affairs and the media.¹⁵ This novel conceptualisation of a freedom of expression instrument is no doubt inspired by the general corporatist influences in the Irish Constitution.¹⁶ The corporatist dimension to article 40.6.1^o might also support an interpretation that the news media as an institution – rather than more liberal individualist conceptions of freedom of expression – had some special constitutional status. Despite these apparent textual possibilities, however, the Irish courts have generally been unenthusiastic in their development of article 40.6.1^o.¹⁷ Until very recently, article 10 ECHR was treated as offering significantly more protection to journalists in Ireland.¹⁸ If the framers of the Irish Constitution had possibly sought to recognise news media’s institutional power within that document, the Irish courts nullified that ambition.

Instead of identifying and exploring such textual, institutional and democratic possibilities, the court in *Re O’Kelly* was instead anxious to assert the superior decision-making authority of the judiciary – over journalists – in determining whether source confidentiality should be protected. *Re O’Kelly*’s forthright judicial repudiation of the existence of a special form of protection for journalists’ sources was subsequently

13 Ibid [35] (emphasis added).

14 See G Hogan, G Whyte, D Kenny and R Walsh, *Kelly: The Irish Constitution* 5th edn (Bloomsbury 2018) [3.2.112].

15 See arts 6.2, 29, 39, Bunreacht na hÉireann 1937.

16 For some discussion of the corporatist influences in Bunreacht na hÉireann 1937, see D K Coffey, *Drafting the Irish Constitution 1937–37: Transnational Influences in Interwar Europe* (Palgrave 2018).

17 See Hogan et al (n 14 above) [7.6.07] and *The Report of the Constitution Review Group* (Pn 2632, Stationery Office 1996) 292.

18 For example, the Supreme Court in *Mahon v Keena* [2010] 1 IR 336 relied exclusively on art 10 ECHR in recognising some form of ‘journalistic privilege’, without any reference to the textually generous art 40.6.1.

affirmed by Finlay CJ in the Supreme Court judgment *Burke v Central Independent plc.*¹⁹ This early assertion of judicial authority is part of what I label the ‘who decides’ question: ‘who decides’ if there is to be any protection against disclosure, the journalist asserting privilege, or the courts? This ‘who decides’ question continued into the seminal Supreme Court judgment of *Mahon v Keena*, where some form of ‘journalistic privilege’ was first recognised in Irish law.²⁰ This question has, I suggest, become a defining feature of the law on journalistic privilege in Ireland.

It is worth reflecting for a moment on this judicial territorialism in relation to the ‘who decides’ question. Irish courts are not alone in their scepticism towards assertions of ‘journalistic privilege’. Hostility towards perceived attempts by journalists to rob the courts of their authority to decide whose evidence is heard is part of a wider trend of judicial ambivalence across the common law world.²¹ While recognising this international trend, the Irish Constitution may, however, provide some additional textual fuel for the antagonism of Irish courts. Article 34.1 does, after all, contain a generously broad, and rigidly interpreted,²² requirement that ‘[j]ustice shall be administered in courts’.²³

Through the Irish courts’ article 34.1 lens, then, the ‘who decides’ question is elevated from an evidential principle to an imperative to defend the constitutional order. On this view, ‘who decides’ is a matter for the ‘judicial power’, not the media ‘organ’. Recalcitrant assertions of privilege by journalists challenge the constitutional authority, and status, of the courts in Irish democracy.

Perhaps curiously, despite multiple references to the ‘judicial power’ and ‘administration of justice’ in the early Irish decisions on journalistic privilege, the courts have not explicitly cited article 34.1. This is a trend that has continued into the more recent judgments examined in this article. An obvious response might be that the separation of powers doctrine only includes the three branches of government, which by definition excludes the so-called ‘fourth estate’ of the media. However, the courts have used article 34.1 to repudiate other forms of non-state power.²⁴ Another reason might be that the Irish courts wish to avoid, despite this strong textual basis, ascribing any enhanced institutional

19 [1994] 2 IR 61.

20 *Mahon v Keena* (n 18 above).

21 Brabyn (n 4 above).

22 See Hogan et al (n 14 above) [4.2.12]–[4.2.15].

23 Bunreacht na hÉireann 1937, art 34.1.

24 See eg *Law Society of Ireland v Malocco* [2005] IESC 5.

status for the news media in Ireland's constitutional order, though this cuts against routine judicial acclamations of the central importance of the news media to the proper functioning of democracy.

Whatever the reason, this potential sensitivity around recognising or ascribing an enhanced status to news media has manifested itself in other, perhaps unfortunate, ways. For example, in its 1996 *Report on Contempt*,²⁵ the Irish Law Reform Commission took the opportunity to consider whether Ireland should adopt a legislative measure similar to section 10 of the Contempt of Court Act 1981 in the United Kingdom (UK). This gives a presumptive right to a journalist (or any other 'publisher') to refuse to disclose confidential sources, unless 'the interests of justice, or national security, or for the prevention of disorder or crime' require it.²⁶ While not the absolute privilege against disclosure asserted by journalists, section 10 does recognise an enhanced degree of autonomy for news media to resist judicial demands for evidence. It also, importantly, still preserves the ultimate authority of the courts on the 'who decides' question: a court can after all decide to pierce the 'privilege' if the listed interests are in play. A minority of the Commission endorsed the proposed change, but one which would have included a threshold of 'necessity' for judicial encroachment to further enhance the protection of journalist sources.²⁷ The Commission's majority rejected the proposal, as they were evidently concerned by the potential impingement on existing judicial authority.²⁸ This rigid refusal to concede any ground to the status of news media, may, as we shall see below, have left Irish law in constitutionally murky waters.

***Mahon v Keena*: recognition and repudiation**

Judicial antipathy towards claims of journalistic exceptionalism enjoyed what appeared to be a substantial reversal in the Supreme Court's seminal judgment in *Mahon v Keena*. Here, for the first time, the Irish Supreme Court endorsed the validity of the *Goodwin*-line of article 10 ECHR in Irish law. In contrast to Irish courts until this point, the ECtHR in *Goodwin* offered an enthusiastic account of the centrality of journalistic autonomy under article 10 in realising and maintaining a healthy democracy. The media's recognised democratic value also

25 Law Reform Commission, *Report on Contempt of Court* (LRC 47–1994).

26 Section 10 has itself been criticised for not affording appropriate value weighting to the journalistic interest in source protection, and for containing exceptions that have been interpreted too expansively. See Brabyn (n 4 above) 916–917.

27 Law Reform Commission (n 25 above) 21.

28 Ibid 22. For an excellent discussion of the scope of judicial sensitivity around encroachment into their sphere of 'administration of justice', see Law Reform Commission, *Issues Paper: Contempt of Court and Other Offences and Torts involving the Administration of Justice* (LRC IP 10–2016).

required, as a corollary, a general right to resist disclosure of confidential source information. The rationale of the ECtHR in *Goodwin* was that, to be an effective accountability tool in a democracy, journalists needed to maintain trust with their confidential sources. Per-*Goodwin*, article 10 requires the courts to respect the integrity of information-gathering networks. This allows for a presumptive journalist ‘privilege’ against disclosure, which required ‘an overriding requirement in the public interest’²⁹ before disclosure should be ordered by the courts. Notably, for our purposes, *Goodwin* is unconcerned with the ‘who decides’ question: that judgment presupposes that courts remain the ultimate determiners of the application of article 10.

The ‘who decides’ question was, however, central to part of the outcome in *Mahon v Keena*. In that case, the defendant journalist Colm Keena had, on the direction of his editor, destroyed the relevant source materials when it became clear proceedings to identify his confidential source were imminent. Drawing on the experience of journalists in neighbouring Britain, his editor determined she could not trust the Irish courts to respect the practical need for source confidentiality.³⁰ While the court may have surprised the *Irish Times* editor when it found in the newspaper’s favour, in its application and incorporation of *Goodwin*, the Supreme Court was at pains to reiterate the continuing supremacy of judicial authority in determining whether this ‘privilege’ was indeed pierced, and disclosure required.³¹ The *Goodwin* version of ‘journalist privilege’, like article 10 from which it is derived, is not absolute, and it is for the courts to decide whether ‘an overriding public interest’ necessitates overriding the protection. For hijacking that undisturbed (by article 10) judicial role in answering the ‘who decides’ question, the defendant newspaper was duly punished by the Supreme Court. While the newspaper won the main legal argument around article 10 ECHR’s applicability, the court made an unprecedented costs order against the victorious newspaper. The newspaper’s subsequent challenge to the costs order’s alleged hollowing-out of its ‘privilege’ in Strasbourg failed.³²

The prospects for success in that ensuing appeal to Strasbourg were, after *Sanoma Uitgevers v Netherlands*,³³ likely to be modest. Though *Sanoma* similarly involved an article 10 ECHR success for journalists seeking to protect confidential sources from criminal investigations by police, the Grand Chamber’s decision ultimately

29 *Goodwin* (n 3 above) [39].

30 Geraldine Kennedy, ‘A cold, calculated decision to step outside the law’ *Irish Times* (Dublin 25 October 2014).

31 *Mahon v Keena* (n 18 above) [92].

32 *Keena v Ireland* (2014) 29804/10.

33 [2010] (Application no 38224/03).

revolved around the absence of an independent judge in authorising and supervising the search and seizure of journalistic materials. The failure of the Netherlands' particular warrant-granting procedures to require a supervising judge is what generated the article 10 breach. If an independent judge had authorised it, any search and seizure would, the Grand Chamber determined, have been permissible under the Convention.

On the 'who decides' question then, the Convention is clear: the courts must decide. While article 10 ECHR may celebrate the central role of the news media in our democracies. In Strasbourg's view then it is the courts, not journalists, that are the ultimate institutional guarantors of democracy.

Constitutionalising journalistic privilege

The last significant decision of note here is Hogan J's novel and refreshing reconsideration of the scope of journalistic privilege under article 40.6.1^o Bunreacht na hÉireann in *Cornec v Morrice*.³⁴ While noting the then recent Supreme Court judgment in *Mahon v Keena* which focused exclusively on article 10 ECHR, Hogan J instead opted for a practically advantageous³⁵ route of recognising confidential source protection as also being a part of the Irish Constitution's fundamental rights. This was the first time such a journalistic right or interest under the Constitution had been observed by an Irish court. Hogan J's judgment in *Cornec* provides an enthusiastic re-evaluation of the express wording of article 40.6.1^o, determining it gives at least equal – if not superior – protections as the article 10 ECHR.³⁶ *Cornec* emphasised the importance placed by the Irish Constitution on both the 'democratic nature of the state',³⁷ and the educative value in free information flow and dissemination:³⁸ 'essential in a free society'.³⁹ While 'journalists are central to that entire process',⁴⁰ anyone engaging in comparable activities (eg bloggers,⁴¹ other 'citizen journalists', and we might assume, research academics) enjoys a degree of enhanced recognition and protection by the Constitution.

34 [2012] IEHC 376.

35 See Carolan (n 7 above).

36 An approach long-advocated by some commentators: see eg Eoin O'Dell, 'So, does Irish law now recognise a journalist source privilege?' (*cearta.ie* 9 August 2009).

37 Bunreacht na hÉireann, art 5.

38 Ibid art 40.6.1.

39 *Cornec* (n 34 above) [46]. For an excellent discussion on this pivot by the courts in constitutionally recognising an enhanced role for journalists in Irish democracy, see Carolan (n 7 above).

40 *Cornec* (n 34 above) [42].

41 Ibid [66].

Thus, in at least one important respect, *Cornec* echoed Walsh J's and other earlier Irish courts' rejection of a specific confidential source 'privilege' limited to 'bona fide'⁴² journalists.⁴³

According to Hogan J, any decision by a court to pierce this general 'privilege' should balance the express high constitutional value placed on public information dissemination and related democratic debate against the competing interest in disclosure. Interestingly, the court in *Cornec* also found that the public interest in affording protection to journalists under article 40.6.1^o provided presumptive confidentiality to both the identity of sources *and* the information they imparted to the journalist.⁴⁴ The constitutional 'privilege' is not merely about source identity protection. For Hogan J, the corollary article 40.6.1^o right attached to that which *the source* wished to be protected. While this focus on the particular source's interest in what should be kept confidential – identity or other information – is more expansive than article 10 ECHR, it is also consistent with the overarching objective of the privilege to generally maintain trust in the journalist–source relationship, and support the integrity of journalist information-gathering networks.

Given the conservative attitude the Irish courts have tended to show towards engaging with the express recognition of the special status of journalists under article 40.6.1^o of the Constitution⁴⁵ – and the mixed blessings of *Mahon v Keena* – Hogan J's richly complementary account of the constitutional role of the media in Irish democracy raised the potential for a change in judicial–media relations. *Cornec* appeared to offer some recognition of the parity of esteem of news media and journalists in safeguarding and enriching Irish democracy:⁴⁶ something preceding judgments, with their obsessive reassertion of judicial supremacy in the constitutional democratic order, seemed disinclined in conceding. However, as with *Goodwin*, it is worth noting that the 'who decides' question was not engaged here: indeed, the court's consideration in *Cornec* of the threshold for judicial overriding of protections again presupposes judicial supremacy.

The principles of journalist privilege in Ireland following *Cornec* can be summarised thus:

42 See 'New practice direction bans "hobby" journalists' *Law Society Gazette* (Dublin 17 November 2018).

43 *Cornec* (n 34 above) [42].

44 *Ibid* [61].

45 Carolan (n 7 above) 185.

46 See generally *ibid*.

- 1 There is no legally recognised journalist privilege against non-disclosure of sources in Irish law (all authorities).
- 2 Irish law recognises a (democratically necessitated) presumptive public interest in confidential source protection under both article 40.6.1^o of the Constitution (*Cornec*) and article 10 of the ECHR (*Cornec* and *Mahon v Keena*). An appropriate shorthand for this interest can be called ‘journalist privilege’.
- 3 Both legal routes – article 10 ECHR, or article 40.6.1^o – place significant weight on this public interest in source protection, but it is not absolute: an ‘overriding’ countervailing public interest can ‘pierce’ this ‘privilege’ (*Mahon v Keena* and *Cornec*).
- 4 The article 40.6.1^o privilege is open to non-journalist ‘publishers’ fulfilling the democratic and educative function envisaged in the Constitution (*Cornec*).
- 5 The article 40.6.1^o privilege applies to both the identity of the source and the information imparted to journalists/publishers by that source (*Cornec*). The question of whether identity or information is protected (or both) is determined by what the source expected to be kept confidential when they disclosed (*Cornec*).
- 6 The decision as to whether this privilege (either article 10 or, we can assume, article 40.6.1^o) applies, or can be pierced, is a matter for the ‘administration of justice’. The balancing of competing interests must therefore, in accordance with article 34.1 of the Constitution, be done by a court. Attempts by journalists to circumvent this judicial role can be punished (potentially by cost orders, and, we might assume, findings of contempt) (*Mahon v Keena*).

DEVELOPMENTS IN 2020: FINE POINT FILMS AND CORCORAN

This section deals with two significant judgments on journalistic privilege handed down within two months of each other in Northern Ireland and the Republic.

In a rare coincidence of timing, the Northern Irish and Irish High Courts in both *Fine Point Films* and *Corcoran* were each asked to examine if judges in lower courts had properly authorised search warrants for a journalist’s home. In both cases, the focal issue was whether those authorising judges had properly considered the rights of journalists to resist disclosure under article 10 ECHR and, in the case of *Corcoran*, article 40.6.1^o Bunreacht na hÉireann.

Alongside the novel coincidence and legal issues at play in both cases, it is useful to contrast legal developments across the Irish border when those developments are so closely connected in timing and facts.

In practical terms, it is also helpful for both lawyers and journalists to compare the approach in the neighbouring jurisdictions on the island. After all, many individuals from both professional camps work cross-border.

Most significantly, the applicant journalist in *Corcoran* also sought to use the judgment in *Fine Point Films* as supporting authority in their own challenge.⁴⁷ This strategy bore more fruit in the subsequent Court of Appeal judgment than it had in the High Court.

In Re Fine Point Films & Others

The Northern Ireland High Court judgment in *Fine Point Films* was delivered in July 2020. The background to this judicial review centred around the controversial documentary *No Stone Unturned*.⁴⁸ The film investigated allegations of British state collusion (through the policing and intelligence estates) in the 1994 ‘Loughinisland massacre’, where six civilians were murdered by loyalist paramilitaries. After its release, the Police Ombudsman for Northern Ireland became aware that the documentary-makers had gained access to sensitive information from the Ombudsman’s own examination of the original investigation into the killings by the Royal Ulster Constabulary. The film described this information as having come from an ‘anonymous source’ in 2011. The Ombudsman reported their suspicions to the Police Service of Northern Ireland (PSNI), who sought the assistance of Durham Constabulary in investigating how the documentary-makers acquired the information: ‘whether by theft or other unauthorised disclosure’.⁴⁹

The key legal dispute in the judicial review centred around the legality of the *ex parte* procedure adopted by the District Judge in deciding to grant a search warrant to the investigating officer from Durham Constabulary. The latter sought the warrant in order to recover the relevant documents and/or search for evidence of how, and from whom, they came into the possession of the film-makers. This included identifying who had leaked the material.⁵⁰ The particular warrant-granting power at issue is governed by the above-noted section 10 of the Contempt of Court Act 1981. The procedures governing this power under section 10 were contained in the Police and Criminal Evidence (PACE) (Northern Ireland) Order 1989: specifically articles 10, 11, 13 and 15, and schedule 1 (paragraphs 3, 9, 11). The absence of a comparable statutory regime in the Republic, and its in-built

47 *Corcoran* [2022] (n 5 above) [81].

48 Director Alex Gibney (*Fine Point Films*, 27 September 2017).

49 *Fine Point Films* (n 1 above) [13]. Counsel for the police also suggested – in the High Court’s view without evidence – that a criminal breach of the Official Secrets Act 1989 was in play (at [35]).

50 *Ibid* [27].

protections for journalists, was, as we shall see, a key issue in the subsequent *Corcoran* judgments.

When seeking the search warrant, Durham Constabulary had argued before the District Judge that an *inter partes* hearing involving the journalist (as was required under schedule 1, paragraph 11(d) where ‘journalistic material’ was being sought) should be dispensed with in that instance. The police argued this was required given the highly sensitive nature of the documents, and the alleged risks to life their publicity posed. The investigating officers also argued that an *ex parte* hearing was necessary to secure potential evidence, as the journalists involved had previously refused to voluntarily disclose information to the police on the basis of an asserted journalist privilege. Their commitment to the privilege, the investigators believed, suggested these journalists might destroy the documents if they were on notice of the intention of the police to search for them.⁵¹ Without referring to the article 10 ECHR rights of the journalists, the police (with whom the District Judge agreed) argued:

The public interest was asserted to be the benefit to the investigation from the retrieval of the information which would help protect life, prevent and deter crime and restore and maintain public confidence within law enforcement.⁵²

In overturning the decision of the District Judge to grant the warrant without an *inter partes* hearing, the Divisional High Court began its review by framing the granting of such search warrants as a ‘draconian power’ and ‘a nuclear weapon’:⁵³ particularly in the context of journalists’ article 10 ECHR rights.⁵⁴ The court went on to find that the *ex parte* hearing was, given the significance of the power granted, procedurally unfair. Citing Hughes LJ in *In Re Stanford International Bank Ltd*,⁵⁵ the court found that, in order to be fair, such a hearing requires the applicant

... to put on a defence hat and ask, what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge. The applicant must, of course, then proceed to tell the judge what those matters are. It is against that standard that we have reviewed the conduct of the application and hearing in this case.⁵⁶

51 Ibid [37].

52 Ibid [39].

53 Ibid [22], quoting *R (Faisaltex Ltd) v Crown Court at Preston* [2009] 1 WLR 1687, [29] and *R (Mercury Tax Group) v Revenue and Customs Comrs* [2009] STC 743, [71].

54 *Fine Point Films* (n 1 above) [21], citing *Roeman and Schmidt v Luxembourg* (2003) ECtHR 51772/99.

55 [2010] 3 WLR 941.

56 *Fine Point Films* (n 1 above) [42].

By not raising the article 10 ECHR rights of the journalists before the District Judge – particularly the *Goodwin* right to source confidentiality, and its requirement of an ‘overriding requirement in the public interest’ to pierce it – the District Judge was unable to undertake the appropriate balancing of interests required under the Convention.⁵⁷ The failure to provide evidence to support the claim that the journalists might destroy the evidence was additionally fatal to the fairness of the procedures. Indeed, the court found the police’s casting such crude aspersions on journalistic ethics could, in and of itself, ‘completely undermine the important role that journalistic sources play in our democratic society’.⁵⁸

Though unnecessary for their determination of the case, in his conclusion Morgan LJ for the court went beyond the narrow procedural point at issue and found that the available materials demonstrated ‘no overriding requirement in the public interest which could have justified an interference with the protection of journalistic sources in this case’.⁵⁹ This barred further attempts by the police to secure a search warrant on the applicant’s premises using the same evidential basis.

All in all, *Fine Point Films* is a vociferous, full-throated endorsement of the central value of journalist source protection in a democracy and a strict application of article 10 ECHR to the powers of police search and seizure in UK law: one welcomed by journalists.⁶⁰ The court’s careful emphasis on the significance of such powers of search by the state, and the stand-alone importance and value of journalistic autonomy in a healthy democracy, were of particular note.

Before moving on to the *Corcoran* judgment, it is worth reflecting on potential source motivations behind the disclosure of sensitive documents relating to ‘Troubles’-era sectarian murders. Source motivation has become, as we shall see, an emergent threshold for article 10 ECHR protection. The Police Ombudsman, PSNI and Durham Constabulary were clearly of the view that the disclosure was likely the result of a theft from the Ombudsman, or breach of some legal duty of secrecy. The High Court seemed sceptical this was the case, but was, regardless, unperturbed by possible criminality on the part of the confidential source. The historic context of the Loughinisland killings, and significant political sensitivities around collusion in Northern Ireland, might permit us to assume that the Northern Irish High Court

57 Ibid [43].

58 Ibid [47]. This suggests that the Northern Irish court was ignorant of, or apathetic towards, the background in *Mahon v Keena* south of the border, where journalists had indeed destroyed documents for fear that they might be compelled by a court to disclose them.

59 *Fine Point Films* (n 1 above) [47].

60 See Jon Slattery, ‘Sources court victory for Irish Times’ (31 July 2009).

viewed the confidential source as comparable to a classic public-sector whistleblower: criminal or not.

While, to be clear, the question of source motivation was not at issue in *Fine Point Films*: the nature and context of the disclosure could easily be argued as fitting the paradigm of a ‘noble’ confidential source, motivated by police/state accountability. As we shall see in *Corcoran* and the ECtHR jurisprudence below, this is a paradigm with which the courts may feel more comfortable.

Corcoran v An Garda Síochána

Two months after *Fine Point Films*, the Irish High Court in *Corcoran* was asked to review a similar complaint by a journalist challenging the legality of a police search warrant. The police search at issue had resulted in the seizure of the journalist’s mobile telephone by An Garda Síochána (AGS – the Irish national police). The case emerged from a highly publicised (in part thanks to the applicant journalist’s reporting on the scene) attack on a farmhouse in Falsk in rural Ireland. In December 2018, in an isolated hinterland of Ireland’s midlands, a family were forcefully evicted from their farm by a security company acting on behalf of a bank seeking to repossess the property following a High Court order. The family resisted, and their resulting violent removal (a particularly sensitive image in rural Ireland)⁶¹ was captured on social media, and widely publicised in the surrounding region. The evicted family and their supporters eventually left the property, and the security company secured and remained in the house to ensure it was not re-occupied. That night, a group of approximately forty masked people attacked the house, driving the security workers from it, and committing a number of serious assaults and arson in the process. The applicant journalist Emmett Corcoran was a local newspaper reporter and editor who was contacted by an unnamed source. That source arranged to meet Corcoran and then escorted him to the farm during, or towards, the conclusion of the organised attack. Corcoran was the first journalist present, and he took a number of photographs and video footage of the scene on his phone. His reporting, which included images of burning vehicles outside the farmhouse, was quickly picked up by national news organisations, becoming a major news story.

Soon after, Gardaí (officers in AGS) interviewed Corcoran under caution as part of their investigation. Corcoran willingly shared copies of the footage he had gathered. However, he refused a request by Gardaí to inspect his phone in order to attempt to identify who had contacted him, citing his obligations to his sources under ‘journalist

61 Rory Carroll, ‘Masked vigilantes attack guards at Irish farmhouse after eviction: Roscommon eviction clash evokes Irish land struggle of 1800s’ *The Guardian* (London 17 December 2018).

privilege'.⁶² A few months later, Gardaí applied to the District Court for a search warrant of Corcoran's home and business premises under section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. During the search Gardaí retrieved Corcoran's password-protected phone. However, before they were able to access its data – and begin identifying potential witnesses or suspects to the attack – Corcoran issued judicial review proceedings in the High Court challenging the legality of the search warrant.

Before Simons J in the High Court, Corcoran's complaint focused on the difficulty journalists claiming 'privilege' had in vindicating their rights under article 10 ECHR and article 40.6.1^o⁶³ due to a lacuna in the Irish warrant-authorising legislation. Unlike in Northern Ireland – where, as discussed above, the PACE (Northern Ireland) Order 1989 made provision for *inter partes* hearings, enabling an 'independent person'⁶⁴ to assess if an 'overwhelming public interest' justified piercing a journalist's article 10 ECHR right to source confidentiality – the 1997 Act in the Republic does not provide for *inter partes* hearings in the District Court. Even more significantly, both parties before the High Court agreed that the 1997 Act also fails to grant the District Court jurisdiction to undertake an article 10 ECHR balancing exercise in determining whether to authorise a search warrant.⁶⁵

According to Corcoran, this apparent lacuna in the statutory scheme for court-authorised warrants left journalists in his position with the sole recourse to the High Court to judicially review the Gardaí and the District Court in order to vindicate their constitutional and Convention rights. While in Corcoran's case the Gardaí had not yet accessed the relevant material as it was password-protected – giving him the time to seek injunctive relief against the state – the applicant noted this may not always be the case. Requiring resolution through High Court litigation would, in many instances, effectively compromise the journalist's rights if Gardaí could immediately access the relevant protected material during a search, which Simons J acknowledged.⁶⁶

62 *Corcoran* [2022] (n 5 above) [15].

63 Simons J found that the same balancing approach as required under the Convention is also required under the Constitution: *Corcoran* [2020] (n 2 above) [49] and [60].

64 See *Sanoma* (n 33).

65 *Corcoran* [2022] (n 5 above) [60]. This striking conclusion appears to be based on an interpretation of 'organ of State' in Ireland's European Convention on Human Rights Act 2003 (that transposed the Convention into Irish law), which excluded the District Court. It is not clear, however, why counsel for *Corcoran* appears to have conceded that the District Court was similarly constrained from considering constitutional rights.

66 *Ibid* [107].

Corcoran's strategy of highlighting this alleged lacuna also had the benefit of reminding the courts of unresolved difficulties in applying a key component of the Supreme Court judgment in *Mahon v Keena*: namely statutory provision for the 'who decides' question.⁶⁷ Given the punitive forcefulness of the Supreme Court's determination in *Mahon v Keena* that this decision is the exclusive constitutional remit of the courts, this line of attack from Corcoran appeared, on its face, promising. The Supreme Court had, after all, criticised and punished journalists for robbing the courts of its rightful authority to determine if the privilege applied. Yet, according to Corcoran, the statutory scheme also effectively disabled the courts from doing so in failing to give the District Court the jurisdiction to consider journalists' article 10 ECHR and article 40.6.1^o rights. Here, judicial authority was deprived by statute, rather than, as in *Mahon*, the journalist. The applicant buttressed this line of attack by pointing to the recent *Fine Point Films* judgment:⁶⁸ where, as we have seen, the proper functioning of the UK's statute-mandated *inter partes* hearing was held by the Northern Irish High Court to be crucial to article 10 ECHR vindication.

However, despite the apparent strength of this line of argument, Corcoran's counsel seemed to struggle over what appropriate (or strategic) remedy to pursue. One logical remedial solution to the applicant's argument might have been a finding of unconstitutionality. In failing to provide the District Court with the necessary power to undertake an article 40.6.1^o/article 10 ECHR balancing exercise, the 1997 Act breached both the journalist's article 40.6.1^o constitutional rights and constrained the proper judicial function under article 34.1.

Following this line of attack, the relevant part of the 1997 Act's warrant-authorising power would be declared unconstitutional, and therefore void *ab initio*. It would also be similarly inconsistent with the state's obligations under the Convention, codified in the European Convention on Human Rights Act 2003. Though, unlike the UK's Human Rights Act 1998, remedies under the 2003 Act are confined to the comparatively (to the Irish Constitution) toothless 'declaration of incompatibility'.⁶⁹

While seeking a declaration of unconstitutionality might now appear an obvious, and desirable, remedy (a point noted by Simons J),⁷⁰ counsel for Corcoran either did not advert to it when drafting initial submission or decided against seeking it. Given the central importance of section 10 to day-to-day policing in Ireland, the latter approach may have been strategically advisable.

67 See *Keena v Ireland* (n 32).

68 *Corcoran* [2022] (n 5 above) [81].

69 Section 5, European Convention on Human Rights Act 2003.

70 *Corcoran* [2022] (n 5 above) [7].

Counsel for Corcoran did, for a time at least, argue for relief in the form of judicial reconstruction of the 1997 Act's provisions enabling *inter partes* hearings: a procedural safeguard which would, it was claimed, bring the Republic's regime closer into line with the Convention-compliant scheme in Northern Ireland. This remedy would have necessitated a significant expansion of the constitutional 'double-construction rule'⁷¹ which enables Irish courts to read legislation in a manner consistent with the Constitution. However, Simons J judged this proposal too radical.⁷² In any event, this line of argument seems to have been somewhat half-hearted, as counsel for Corcoran conceded during proceedings before Simons J that the District Court would still not have the jurisdiction to undertake the appropriate balancing of interests exercise required by both the Constitution and the Convention.⁷³ What good would a judicially constructed *inter partes* procedure be if the District Court hearing it could not weigh the interests of one party?

Instead, the applicant settled on the argument that the Gardaí should – in light of previous recognition of 'journalist privilege' by Irish courts – have sought their warrant before the High Court.⁷⁴ The Irish High Court's expansive constitutional jurisdiction⁷⁵ would have allowed it to undertake the necessary balancing of interests, thereby enabling the proper vindication of Corcoran's journalistic interests under article 40.6.1^o and article 10 ECHR. If the High Court felt the 'privilege' could be pierced, order 50, rule 5 of the Rules of the Superior Courts⁷⁶ could, according to the applicant, have enabled the High Court to provide the Gardaí with the legal authorisation to search and seize the phone. The respondents' failure to seek this authorisation before the High Court meant that, according to the applicant, the warrant was unlawful, and Corcoran's phone should be returned by the Gardaí. As with *Fine Point Films*, this legal strategy saw journalists seek to use the 'who decides' question to attack Executive infringement. Given the examples of journalist ambivalence about the legal position on 'who decides', this must be treated as simple strategy, rather than a commitment to the legal boundaries of the privilege.

This proposed remedy appears to have satisfied whatever strategic concerns may have troubled the applicant, enabling Corcoran to avoid

71 *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317.

72 *Corcoran* [2022] (n 5 above) [79], [81] and [82].

73 *Ibid* [60], [80] and [84].

74 *Ibid* [85].

75 Art 34.3.1, Bunreacht na hÉireann.

76 Order 50, r 5 reads, 'The Court ... may make any order for the detention, preservation, or inspection of any property or thing'.

asking the High Court to find as unconstitutional key procedures for authorising routine police action. However, Simons J noted this argument also posed its own ‘difficult legal issues’.⁷⁷ The absence of the Attorney General as a notice party in the case was, given the high constitutional stakes, additionally concerning for the judge.⁷⁸

AGS’s response was to argue that, as the matter was now before the High Court, Simons J could undertake the necessary balancing of interests, making the larger legal argument moot.⁷⁹ Simons J suggested this solution was also unsatisfactory,⁸⁰ perhaps perceiving the suggestion as a brazen attempt to avoid serious legal questions.

Despite this apparent desire to engage with the tricky constitutional issues, Simons J was able – with the assistance of counsel for AGS⁸¹ – to identify his own pathway away from potential legal controversy. Simons J’s neat solution was to deny that Corcoran’s confidential source was actually a source at all – at least as far as the Constitution or the Convention were concerned:

The Applicants’ case is predicated on an assumption that ... they are entitled to rely on journalistic privilege to resist disclosing the content of the mobile telephone. The Applicants’ criticisms of the procedures adopted by An Garda Síochána all flow from that assumption. For the reasons which follow, I have concluded that that assumption is not well founded, and that there is no right to rely on a claim of journalistic privilege in this case.⁸²

Simons J’s pathway away from constitutionally and practically tricky waters was inspired by some recent developments in the ECtHR in relation to article 10 protections for journalist privilege where the court attributes particular nefarious characteristics or intention to the confidential sources.

While the applicant in *Corcoran* was, perhaps understandably, operating under the assumption that crime reporters might legitimately have, as part of their rolodex of confidential sources, those actually engaged in crime: Simons J fastened onto a little-discussed⁸³ ECtHR decision from 2014 to help narrowly resolve the case.

77 *Corcoran* [2022] (n 5 above) [88].

78 *Ibid* [89].

79 *Ibid* [87].

80 *Ibid* [88].

81 *Ibid* [101].

82 *Ibid* [90].

83 With the exception of ‘Journalistic sources: right to receive and impart information’ (2014) 5 *European Human Rights Law Review* 537.

A source-motive test for confidential source protection?

*Stichting Ostade Blade v Netherlands*⁸⁴ involved an article 8 and 10 challenge by a magazine publisher in the Netherlands to a domestic court's authorisation of a police search and seizure of computers. The search was part of an investigation into a bombing campaign by environmental activists in the 1990s. The magazine in question, *Ravage*, had suggested it would publish a letter from the group claiming responsibility. This claim attracted the attention of the investigating police, who, under the supervision of an investigating judge, attempted to find the letter in warrant-authorized searches of the magazine's premises. The magazine sued for breach of their Convention rights under articles 8 and 10, but the domestic courts rejected their claims.⁸⁵

In determining that the magazine's subsequent appeal to the ECtHR was inadmissible, that court set out a significant new dimension to the *Goodwin*-line⁸⁶ of article 10 jurisprudence on journalist source protection. In *Stichting Ostade Blade*, the Strasbourg court focused on the motivations (or, more accurately, the motivations the court speculated were operative) behind the eco-terrorist source's decision to contact the magazine. It found their ambition was solely to enhance publicity for their bombing campaign: a sinister appropriation of the magazine's power to communicate with its readership. The court used this determination of nefarious source motive to establish a new evaluative threshold for article 10's confidential source protection. The ECtHR in *Stichting Ostade Blade* concluded that article 10 did not apply in this case, as the public did not have an interest in knowing the information generated from a cynical exploitation of both the news media's communication power and the privileges article 10 provides them. Citing the idea of confidential 'sources in the traditional sense' from its earlier decision in *Nordisk Film & TV A/S v Denmark*,⁸⁷ the effect of *Stichting Ostade Blade* is to erect a distinction between confidential news sources worthy of article 10 protection and those deemed unworthy.

For the High Court in *Corcoran*, this refinement of the scope of article 10 allows a court to dispense with the need to balance the interest in criminal investigation against the overriding interest that

84 (2014) 59 EHRR SE9.

85 Interestingly, the Amsterdam Court of Appeal did find that while the attempt to identify the journalists' sources by searching their premises was not an art 10 breach, investigating potential links between the magazine and the environmental activist group (ie a 'fishing expedition' for evidence based solely on the magazine's reporting) was a breach of art 10. See *Stichting Ostade Blade* (n 84) [27].

86 *Goodwin* (n 3 above).

87 40485/02 (Decision 8 December 2005) section I.

normally attaches to journalism. On this view, *Stichting Ostade Blade* positions a source motive test *before* the article 10-mandated *Goodwin* balancing of interests takes place.

The democratic value of hearing from nefariously motivated sources is presumptively deemed weaker than the state's interest in criminal prosecution: a position of questionable merit, given the democratic value surely comes from the information released, not the motivation of the messenger. While it is beyond the scope of this article to examine the implications of this position in detail, it suffices to say that, so interpreted, *Stichting Ostade Blade's* source motive test may have a significant impact on the capacity of crime-reporting journalism to legally resist disclosure of confidential source material.

While the High Court in *Corcoran* structured its analysis and reasoning in line with the article 10 jurisprudence, the case was expressly determined under article 40.6.1^o.⁸⁸ This codification of ECtHR jurisprudence directly into the Constitution was, in and of itself, quite significant. However, given the textual distinctiveness of article 40.6.1^o, it is unfortunate Simons J was seemingly unwilling to consider if article 40.6.1^o offered journalists different, or perhaps more expansive protection – as Hogan J had suggested in *Cornec* – to that provided under article 10 ECHR. For example, it was open to the High Court to hold that *Stichting Ostade Blade* excessively and illegitimately narrows confidential source protection, and that article 40.6.1^o excluded this recent Strasbourg development.

The High Court in *Corcoran* began the decisive part of its judgment by comfortably attributing a nefarious motive to the applicant's anonymous source. Simons J concluded that the source's desire was to publicise their criminal wrongdoing (as the ECtHR found in *Stichting Ostade Blade*), and, more seriously, to intimidate future security workers who might attempt to undertake evictions on behalf of financial institutions.⁸⁹ This 'not unreasonable inference' is critical to the High Court's finding that the quality of the journalist–source relationship here – where the source sought to exploit the mass communication power of the journalist to disrupt otherwise lawful conduct – did not

88 The High Court judgment in *Corcoran* [2020] (n 2 above) began by emphasising the supremacy of the Irish Constitution over the Convention in this legal dispute, but then proceeded to rely exclusively on authorities from the latter. The effect is to silently transpose the Strasbourg court's recent narrowing of art 10 jurisprudence into art 40.6.1^o of the Irish Constitution. This privileging of the Constitution over the Convention is mandated under the Irish constitutional order: if a legal dispute can be decided under Irish constitutional rights and norms, that resolution takes precedence over any potential remedies under the Convention, or the 2003 Act that codified it in Irish law. See *Carmody v Minister for Justice, Equality and Law Reform* [2009] IESC 71.

89 *Corcoran* [2022] (n 5 above) [92] and [99].

attract article 40.6.1^o protection. Indeed, not only was this kind of confidential source relationship unworthy of constitutional protection, such a source was also – *per Stichting Ostade Blade* – not *really* a confidential journalistic source at all.⁹⁰ This finding dispensed with the need for an enhanced weighting for a journalist’s confidential source interest in any balancing exercise by the courts.

To reinforce his findings regarding the source’s nefarious motive, Simons J also included a purported balancing of interests analysis, which both minimised the extent of the encroachment on Corcoran’s article 40.6.1^o rights, while emphasising the significance of the state’s interest (*qua* ‘public interest’):

An Garda Síochána seek to conduct a very limited examination of the content of the mobile phone in support of their investigation of alleged offences of the most serious kind.⁹¹

It is perhaps trite to observe that describing the encroachment sought by An Garda Síochána as a ‘very limited examination’ neatly elides how the examination in question – whose exclusive purpose was to identify Corcoran’s source – fundamentally compromises the applicant’s asserted confidential source interest. In terms of the constitutional rights at play, the examination sought by the Gardaí was, in truth, of grave significance for the applicant, his professional work and the ethical framework which governed that work.

In its final substantive conclusion, the High Court again returned to the question of source motivation. Drawing on *Stichting Ostade Blade*, Simons J found that the source was not ‘motivated by the desire to provide information which the public were entitled to know’.⁹² Because of this absence of proper motivation – regardless, it seems, of whether the information provided *was* of the kind the public were entitled to know – the source relationship did not attract the protection of journalist privilege.

A potential wider scope of *Corcoran*: no protection for crime-reporting journalism?

Though the High Court’s finding that Corcoran’s source was not *really* a source seemed designed to avoid the kind of robust weighting for confidentiality required by *Goodwin*, the judgment still ended up engaging in a lot of balancing. While these aspects of Simons J’s judgment may be confined to *obiter*, they do offer some interesting insights into in what circumstances Irish courts might apply journalist privilege where a criminal investigation is at issue.

90 Ibid [100].

91 Ibid [93].

92 Ibid [102].

The disclosure of journalistic sources might well be disproportionate in the case of *minor offences*. This would be especially so where the alleged criminality relied upon is directly connected to the publication complained of. More specifically, an allegation that the provision of information to a journalist had involved the ‘theft’ of confidential information would not, generally, be sufficient to defeat a claim of journalistic privilege. Were it otherwise, it would be all too easy to suppress the publication of material by conjuring up an alleged criminal offence.

The facts of the present case are, however, entirely different. Here, the criminal conduct alleged consists of the carrying out of ‘*arrestable offences*’ as defined. These are said to arise out of a serious assault and the destruction of property. The criminal conduct is extraneous to, and separate from, the disclosure or publication. I am satisfied that the public interest in ensuring that all relevant evidence is available in the pending criminal proceedings overrides the claim for journalistic privilege in this case ... there is [also] a related public interest in the proper investigation of criminal offences.⁹³

These paragraphs raise two interesting points.

The first is the court’s consideration of the connection between the transfer of information and the alleged criminal conduct. In what will no doubt be seen by journalists as a welcome move, this paragraph appears to provide confidentiality protection for journalists, where their sources have committed a criminal offence merely by sharing information. We might be forgiven for speculating that the judge had in mind certain paradigmatic kinds of public-sector whistleblowing: a topic of major public controversy and debate in Ireland over the past decade.⁹⁴ Though the judge did not directly connect the *Fine Point Films* case at this point, Simons J could well have argued *Corcoran* could be distinguished from the recent judgment from Northern Ireland, which, as we have seen, appeared to be that paradigm example of such a public-sector whistleblower.

The heavy emphasis on source motive in *Corcoran* and the supporting ECtHR authorities may raise questions about what other motivations the courts might deem unworthy: perhaps fame or financial gain.⁹⁵ The judgments in both *Stichting Ostade Blade* and *Corcoran* could be viewed as more concerned with the imputed source goal of attracting fame, rather than the source’s criminal conduct. The

93 Ibid [95]–[97] (emphasis added).

94 See eg discussions by Charleton J in *The Disclosures Tribunal: Third Interim Report* (November 2017).

95 For example, the offence under s 62 of the Garda Síochána Act 2005 requires that the person leaking the information knows it will have a harmful effect. The court’s emphasis on motive here might suggest art 40.6.1 protections would not apply where the information was leaked in contravention of s 62.

difficulty with how these courts have privileged source motive over the substantive quality and value of the information disclosed is that it is not clear what the boundaries on legitimate source motivation are. Whistleblowers may disclose for a variety of reasons: but their value to healthy democratic governance is arguably not rooted in their motivations, but the accuracy and insightfulness of the information they bring to light.

Potentially of far greater significance is Simons J's distinction between Garda investigations into 'minor' and 'arrestable' offences. The former, it seems (perhaps depending on motive), attract the protection of journalist privilege under the Constitution. However, where Gardaí are investigating the more serious category of 'arrestable offences',⁹⁶ journalists should not, it seems, expect to successfully raise the privilege. This, it is suggested, is a step beyond the source motive threshold for article 10 protection set out in *Nordisk Film* and *Stichting Ostade Blade* and narrows journalist privilege under article 40.6.1^o even further.⁹⁷ This aspect of *Corcoran* may create significant challenges and risks for crime reporters who use confidential sources to report on any serious criminal wrongdoing. Simons J's reasoning here does not suggest it is confined to circumstances where the source themselves are the perpetrators of the said arrestable offence. That the confidential source may know materially relevant information about the alleged 'arrestable offence' could, it seems, suffice for piercing journalist privilege in favour of a criminal investigation. This may, in effect, functionally exclude much crime and policing reporting from article 40.6.1^o protection.

Simons J considered that the court in *Re O'Kelly* had gone 'too far' by concluding journalists had no special position in the Irish Constitution order.⁹⁸ However, his judgment in *Corcoran* privileges the 'public interest in the proper investigation of criminal offences',⁹⁹ with little consideration for any distinct value of crime reporting in Irish democracy. This may suggest judicial scepticism about any such value.

96 Defined under s 2 of the Criminal Law Act 1997 to include a broad array of offences under Irish criminal law.

97 Indeed, if this aspect of *Corcoran* holds sway, it may confine the constitutional protection Simons J was willing to afford to the noble whistleblowers, where the said source commits an 'arrestable offence' by transferring information: for example, s 9 of the Official Secrets Act 1963.

98 *Corcoran* [2022] (n 5 above) [94].

99 *Ibid* [97].

2022: COURT OF APPEAL JUDGMENT IN *CORCORAN*

Following a post-judgment re-hearing of *Corcoran* before the High Court, where it became clear to the parties and the court that the judge's original order for data disclosure from Corcoran's phone was not technically possible, the High Court issued a supplementary judgment on the scope of disclosure in the case.¹⁰⁰ The core of this ruling was to exclude from the data disclosed to AGS the 'contact details (such as names, telephone numbers, email addresses etc) saved on the mobile telephone'.¹⁰¹ The apparent effect of this ruling was highly significant given the general tenor of the original judgment. If no names, phone numbers or email addresses could be disclosed to AGS, then the disclosure would not provide the investigating officers with the specific information they sought: namely some identifying information (in the form of a name, a number or an email address) from Corcoran's source in the Falsk incident. While the High Court seemed unwilling – in principle at least – to vindicate the journalist's specific claim of privilege in the case, that court appeared willing to so vindicate through the practical effect of its disclosure order.

Both sides brought appeals of these judgments: the applicant journalist focusing on the legal principle, and AGS on the practical effect of the High Court's order.

The Court of Appeal in *Corcoran*¹⁰² – in a significant judgment that sets out a strong constitutional status for journalistic privilege in Ireland – took the opportunity to revisit some of the key assumptions made by counsel and the High Court in the original judgment. Most notably, the court here reopened the question of the jurisdiction of the District Court to consider journalistic privilege when deciding to grant a search warrant under section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. As noted above, the High Court found – and the applicant's counsel apparently agreed – that the District Court did not possess the necessary jurisdiction under section 10 to undertake the balancing of interests required in assessing a claim of journalistic privilege. The Court of Appeal found this conclusion was made in error.¹⁰³ According to the court, this error was based on an incorrect belief by counsel and the High Court that the right of journalistic privilege always required an *inter partes* hearing. This is, according to the court, not always the case – sometimes *ex parte* hearings can, once managed appropriately, vindicate the rights of the journalists. This is a point made clear by the court in *Fine Point Films*.

100 *Corcoran v AGS* [2021] IEHC 11.

101 *Ibid* [4].

102 *Corcoran v AGS* [2022] IECA 98.

103 *Ibid* [128]–[129].

District Court jurisdiction to consider journalistic privilege

On the question of District Court jurisdiction, the Court of Appeal delved into the jurisprudence on the relationship between administrative and judicial functions/powers.¹⁰⁴ Here, the court concluded that while section 10's power was an 'administrative act' – not the 'administration of justice' – section 10's designated decision-maker (the District Court) was nevertheless 'acting judicially' in exercising that warrant-granting power.¹⁰⁵ In 'acting judicially' then, the District Court was *required* to consider the impact on fundamental rights that might flow from a decision to grant AGS a search warrant for a journalist's home and work premises. The court found the failure of the District Court to appropriately consider such rights in its decision to grant the warrant resulted in an unlawful interference with the applicant's rights under the Constitution and Convention.

The Court of Appeal's judgment then went on to significantly develop the procedural parameters governing warrant-granting in cases of journalists in Ireland. The court agreed with the High Court in *Corcoran* that section 10 did not permit *inter partes* hearings along the lines provided for under Northern Ireland's statutory scheme. However, Costello J's judgment for the Court of Appeal went on to set out the procedural requirements the District Court should have observed in the *ex parte* hearing. Approving, and drawing significantly upon the Northern Ireland High Court's judgment in *Fine Point Films*, the Court of Appeal found that part of AGS's 'duty of candour'¹⁰⁶ to the District Court in that case included disclosing that the journalist had asserted privilege over the material.¹⁰⁷ More importantly, AGS were also constitutionally obligated to advise the District Court of the significant rights and interests in play under the Constitution and Convention in granting a search warrant of a journalist's home and workplace. At a 'minimum', AGS should advise the District Court:

... the warrant may result in the seizure of material captured by journalistic privilege, if the judge is advised of his or her obligation to take account of this in issuing the warrant, and if a legally sufficient basis for overriding that privilege is identified and explained.¹⁰⁸

Following this required minimum disclosure by AGS to the District Court, it was then for that court 'to determine whether [AGS] had convincingly established that there was an overriding requirement in the public interest which required that the journalistic privilege

104 Ibid [99]–[105].

105 Ibid [100], [108]–[110].

106 Ibid [106].

107 Ibid [133]–[135].

108 Ibid [100], [111]–[113].

should be interfered with and they should be compelled to reveal their sources'.¹⁰⁹

Oireachtas on notice

Throughout the Court of Appeal's analysis of the facts and law, a number of warnings were directed towards the Oireachtas about the gaps and inadequacies in Ireland's section 10 warrant-granting regime. The Supreme Court judgment in *Corcoran* also echoed these warnings. Among the more subtle of these saw the court echo comments from the Northern Irish court in *Fine Point Films* about the preferability of disclosure orders to search warrants in terms of risk to constitutional and Convention rights.¹¹⁰ That the Irish statutory scheme makes no provision for such disclosure orders in criminal investigations was the first of two major weaknesses highlighted.¹¹¹ As we shall see below, the judgment seems to suggest this state of affairs will make it hard for AGS to get source information that journalists have asserted privilege over, even where that source is, *per Stichting Ostade Blade*, not a real source.

The more serious warning shot to the legislature centred around the Court of Appeal's repeated reference to the 'appropriateness' of *ex parte* hearings in determining whether to grant warrants against journalists. The court made clear that – though not in this particular case – there would be instances where an *ex parte* hearing was inappropriate in the circumstances, and that the Constitution required an *inter partes* hearing to vindicate the journalist's rights:

It may well be that there will be circumstances in which under Irish law it is not appropriate that this exercise be conducted on foot of an *ex parte* application and, to that extent, Irish law is deficient in failing to provide for a procedure of the kind considered in *Fine Point Films* whereby an *inter partes* hearing can be conducted while at the same time enabling protection of the information against destruction pending that hearing.¹¹²

The obvious potential outcome of such a case where an *ex parte* hearing was inappropriate would be a finding of unconstitutionality against the section 10 warrant-granting regime and a striking-down of the law: a result with potentially significant consequences for policing in Ireland. The court concluded by calling for the enactment of a scheme comparable to that north of the border:

... it would undoubtedly be preferable if the Oireachtas legislated in this complex area and established a clear constitutional and conventional

109 Ibid [138].

110 Ibid [119].

111 Ibid [148].

112 Ibid [124].

compliant procedure analogous to that in the Criminal Justice (Miscellaneous Provisions) Act, 2011 in respect of legal professional privilege or that which exists in Northern Ireland.¹¹³

Application of *Stichting Ostade Blade*

The Irish Court of Appeal also employed an interesting application of *Stichting Ostade Blade*. The court accepted, along the lines discussed by the High Court, the Strasbourg case as authority for some journalist sources not being ‘real’ sources for the purposes of article 10 ECHR and article 40.6.1^o.¹¹⁴ Remember, the High Court in *Corcoran* had used *Stichting Ostade Blade* to avoid the potentially messy constitutional issues that lurked beneath this case. If Corcoran’s source was not a ‘real source’, then the journalist’s rights were not engaged, and there was no need to worry about whether the District Court had properly considered such rights in granting the warrant. In contrast, the Court of Appeal found that, even if Corcoran’s source was not a ‘real source’, the rights of the journalist were still engaged and should have been weighed by the District Court. The Supreme Court in *Corcoran* roundly endorsed this approach.

Part of the reason for this departure from the High Court’s conclusion in *Corcoran* appears to be that, given the wide breadth of the search warrant granted to AGS, other legitimate sources could easily be identified to Gardaí during their search. Even where the weight to be attached to the journalist’s interest in such a case was much less than for legitimate sources, a balance must be struck to ensure no legitimate sources are identified. The Court of Appeal also, unlike the High Court, rejected the claim by AGS that the appeal court could retrospectively legitimate the warrant by undertaking its own balancing exercise. Once the original warrant-issuing court had failed to consider the journalist’s rights, the constitutional breach had occurred and could not be remedied.¹¹⁵

If the Court of Appeal was seriously concerned about the expansive breadth of search warrants, and their potential to breach constitutional rights, this again highlights the weakness of the Irish regime in failing to empower the courts to grant disclosure orders in such criminal investigations. The court’s focus on the ‘sledgehammer’ nature and effect of search warrants also potentially neuters the kinds of negative ramifications of *Stichting Ostade Blade* for crime-reporting journalism in Ireland identified in this article: at least until the Oireachtas legislates for disclosure orders.

113 Ibid [147].

114 Ibid [97].

115 Ibid [97].

However, there is another possible interpretation of the Court of Appeal judgment on this point. The general tenor of Costello J's findings focused on the procedural failures in the District Court in failing to balance the rights. While the court accepted the Strasbourg authority, it spent no time reflecting on the actual public interest weighting that should have attached to Corcoran's confidential sources. Indeed, as we have seen, the court rejected the appropriateness of such an *ex post facto* weighing of interests by an appeals court. If the District Court in *Corcoran* had actually engaged in the balancing of interests, and concluded that the source was not a source 'in the traditional sense', then it is difficult to imagine what grounds for complaint the Court of Appeal would have. If this is the more accurate interpretation of the Court of Appeal's judgment in *Corcoran*, then the problems identified here for some forms of crime reporting likely persist. Indeed, the concurring judgments of Collins J and Hogan J in the *Corcoran* appeal to the Supreme Court, indicate this is the case.

Implications for the Garda Síochána (Powers) Bill

This key part of the judgment also, intentionally or not, contained another potential warning shot to the Irish legislature. In response to recommendations by the Commission on the Future of Policing in Ireland, the Department of Justice has proposed two significant pieces of policing legislation which are before the Oireachtas. One, the Garda Síochána (Powers) Bill 2021, includes a controversial¹¹⁶ proposal for a criminal offence where a person refuses a request to divulge passwords for their digital devices.¹¹⁷ While the Court of Appeal was at pains to emphasise that password protection should not be relied upon by the state to retrospectively legitimise an unlawful search and seizure, the facts of *Corcoran* make clear how important maintaining password protection can be to give practical effect to journalistic privilege. If, for example, Corcoran had felt compelled to disclose the password for his phone to Gardaí out of fear of criminal sanction – conceivably giving investigating Gardaí immediate access to his confidential source information – then it is unlikely that the subsequent reviewing courts could have effectively vindicated his rights. The Court of Appeal judgment in *Corcoran* suggests, at the very least, that this proposed offence requires very careful consideration to avoid improper encroachment on fundamental rights.

116 See Irish Council for Civil Liberties, 'Power to compel passwords must be removed from Police Powers Bill' (1 June 2022).

117 Head 16 – Powers under search warrant.

EMERGING PRINCIPLES GOVERNING JOURNALISTIC PRIVILEGE IN IRELAND (AND EUROPE)

The Court of Appeal in *Corcoran* took some time to set out in detail the relevant principles (28 in all) governing journalistic privilege in Ireland.¹¹⁸ The initial six principles set out at the beginning of this article are all included in the Court of Appeal's restatement. However, a number of new additions and refinements have been made in the recent judgments. All have been described and analysed thus far in this article.

In general terms, *Corcoran* has continued the High Court in *Cornec*'s broad importation of the *Goodwin*-line of article 10 ECHR jurisprudence directly into article 40.6.1^o Bunreacht na hÉireann. The wholesale importation of ECtHR jurisprudence on article 10 ECHR's confidential source protection into article 40.6.1^o is, to say the least, notable. The Court of Appeal *Corcoran* judgment in particular suggests a newfound appetite in the Irish appellate court to enforce robust protections for confidential news sources: one which will surely be welcomed by Irish journalists. Like the Northern Irish High Court's judgment in *Fine Point Films*, the Court of Appeal's judgment in *Corcoran* is a full-throated endorsement of journalist privilege when facing the coercive and punitive arms of the state. The judgment is the first where the courts have actively constrained part of a serious criminal investigation to protect the rights of journalists to protect confidential sources. The recent Supreme Court judgment in *Corcoran* has, however, raised some significant doubts about the *Cornec* line of article 40.6.1^o authority. Here, the Supreme Court was careful to emphasise that its ruling was narrowly focused on article 10 ECHR principles, and the 2003 ECHR Act. While Hogan J consciously and thoughtfully reaffirmed his position in *Cornec*, the *obiter* judgments of O'Donnell CJ and Collins J make clear that the constitutional status of 'journalistic privilege' in Ireland remains an open question. Both judgments preferred to avoid conclusive determinations on the question until the point had been fully argued at trial. Collins J's judgment was, however, tonally sceptical regarding the veracity of the *Cornec* line of authority.

This article has also suggested that there remains ongoing uncertainty about the potential scope of *Stichting Ostade Blade* in Irish and European law. This article argues that this authority potentially undermines confidential source protection for some kinds of crime-reporting journalism. One interpretation of *Corcoran* implies that warrants against journalists in Ireland will always face the enhanced protection afforded to confidential new sources under article 10 ECHR

118 *Corcoran* [2022] (n 102 above) [97].

and article 40.6.1^o. On this view, journalistic privilege should not be pierced even when a police investigation into a serious crime is in play. Though the Northern Irish court in *Fine Point Films* did not consider the implications of *Stichting Ostade Blade*, that court's willingness to similarly nullify a core component of a police investigation into a serious crime suggests a similar approach will be adopted there.

However, this article also notes that this interpretation of the judgment in *Corcoran* may not give comfort to crime-reporting journalism. The 'source motive' test described here that emerges from *Stichting Ostade Blade* has now been affirmed as a part of the Irish Constitution's freedom of expression protections. The Court of Appeal accepted that very little weight might be attached to sources the court deems ignoble.¹¹⁹ The primary concern in *Corcoran* was, after all, procedural.

For the police and warrant-authorising courts, these recent cases have demonstrated that appellate courts in Ireland are now willing to nullify police search and seizures where fundamental rights are ignored in the warrant-granting procedure. Police seeking such warrants must now carefully emphasise to the authorising court that the subject of the search is a journalist; that confidential source material may be gathered during that search; and that such confidential source material carries heightened constitutional protections. These judgments also suggest that warrant-authorising courts will have to demonstrate clearly they have given the necessary consideration and weighting to journalistic privilege in deciding to grant a search warrant. Both Irish and Northern Irish courts have found that *ex parte* hearings can, once they observe the necessary consideration of fundamental rights, vindicate those rights. However, there are certain – as yet undefined – circumstances where an *inter partes* hearing is necessary under both the Convention and Constitution.

CONCLUSION

This article has sought to disentangle a number of complex, interconnected features of Irish and European legal protection for confidential journalistic sources. Trends on both sides of the Irish border over the past two years suggest that Irish courts are now taking journalistic privilege seriously and are willing to arrest and nullify coercive police and state encroachment on journalistic autonomy. These judgments are notable for providing robust endorsements of journalistic freedom and an appreciation of the practical challenges in

119 The judgments of both Collins J and Hogan J in the Supreme Court also unproblematically endorsed *Stichting Ostade Blade*.

realising those freedoms. *Fine Point Films* and the Court of Appeal in *Corcoran* saw Irish courts set firm boundaries on the scope of criminal investigations and issue new robust guidance to warrant-authorising courts on the necessity, value and importance of journalists' rights in our democracies. The Court of Appeal in *Corcoran* also issued some stark warnings to the Oireachtas regarding current deficiencies in Irish law, with implications for proposed enhancements of police power and criminal law.

There remain, however, some unresolved aspects of these cases. In particular, the High Court judgment in *Corcoran* suggests serious potential impacts of *Stichting Ostade Blade* on crime-reporting journalism. Though the Court of Appeal successfully avoided some of the inevitable implications of that Strasbourg authority, the quick willingness of both courts to dismiss the potential value of so-called 'non-traditional' sources in our democracies is worth interrogating more closely.