

THE HIGH COURT

[2024] IEHC 289

[Record No. 2018/8484P]

BETWEEN

MARTIN BRIGHT

PLAINTIFF

AND

THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr Justice Mark Sanfey delivered on the 14th day of May 2024

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Introduction

1. On 29 August 2018, a written order (referred to herein as ‘**the Order**’) was issued by Commandant James Sharkey, the Officer Commanding 1 Armed Cavalry Squadron, a unit within the Permanent Defence Forces (‘**the Defence Forces**’). The Order stated as follows:

“1 ACS Troops

ATTENDANCE AT UNOFFICIAL PARADES AND PROTESTS

1. The General Staff have been made aware that there may be some unofficial parades and protests on behalf of members of the DF in the coming weeks.

2. D COS (Sp) Maj Gen COTTER has requested that all members of the DF are cognisant that attendance in uniform or civilians at such events in [sic] NOT compatible with military service.

3. Members of the DF should be aware that they should NOT attend such unofficial parades and protests.

4. For your information,

J SHARKEY

COMMANDANT

OFFICER COMMANDING

1 ARMD CAV SQN”

2. The plaintiff, who is Deputy General Secretary of the Permanent Defence Forces Other Ranks Representative Association (**PDFORRA**), considered that this Order precluded him from attending a “peaceful assembly and protest” – as it was called at para. 5 of the statement of claim – organised by a group called the “Wives and Partners of the Defence Forces”. The intention of the plaintiff had been to attend in his personal capacity while off duty and in civilian clothing. He asserts that his proposed attendance was not directed, required, or organised by PDFORRA.

3. At para. 6 of his written submissions, the plaintiff contends that the Order was “(i) *ultra vires* the power of the Defendants, their servants or agents pursuant to the provisions of the Defence Acts 1954-2007, as amended (**‘the Defence Act’**) and (ii) constituted a violation of his rights to free expression, assembly and association, as guaranteed by the Constitution of Ireland and the European Convention of Human Rights and Fundamental Freedoms 1950 (**‘the Convention’**).”

4. The defendants deny the plaintiff’s claims on a number of bases which I shall outline in this judgment. Both sides adduced evidence as to the circumstances in which the Order

was made, and the significance which the parties respectively attached to it. Both sides called evidence as to the effect of the Order and how it should be interpreted.

The statement of claim

5. The plaintiff holds the rank of acting sergeant in the Defence Forces. At the time of the matters in issue in these proceedings, he was seconded to PDFORRA to act as its deputy general secretary. In the statement of claim, the plaintiff refers to a “peaceful assembly and protest” which took place in the vicinity of Merrion Square, Dublin 2 on 19 September 2018, which concerned “conditions of service of members of the Defence Forces”. He pleads that “the protest” was attended by “a number of wives and partners of serving members of the Defence Forces, as well as retired members of the Defence Forces”. The plaintiff states that “...as a member of the Defence Forces with legitimate and genuinely held concerns in respect of the conditions of service of the members of the Defence Forces” ... he wished to attend the event “...while off-duty, and in civilian attire” [para. 5 statement of claim].

6. The plaintiff asserts that, as a member of the Defence Forces, he is subject to military law at all times, and that the Order “constituted an order, instruction or command within the meaning of the Defence Act and the regulations made pursuant thereto” [para. 7 statement of claim]. He makes the point that, pursuant to s.131 of the Defence Act, disobedience of the order would render him guilty of an offence under military law, and liable on conviction, to *inter alia*, a term of imprisonment not exceeding seven years. The plaintiff contends that, as a result of the Order, he did not attend the protest which he would otherwise have.

7. It is pleaded that the Order was unlawful and *ultra vires* in the following respects:
“(a) No express power exists in the Defence Act which allows an officer of the Defence Forces to order a member of the Defence Forces to refrain from attendance at a civilian event, while off duty and not in uniform.

(b) While Defence Force Regulation A.9 and in particular administrative instruction A9 concerning dress and medals prohibits the attendance by members of the Defence Forces at political events while in uniform, no such restriction applies in respect of soldiers in civilian attire.

(c) The plaintiff has rights to be treated equally with fellow citizens and enjoys rights to freedom of expression, association and assembly, pursuant to Articles 40.1 and 40.6 of the Constitution. The first named Defendant, his servant or agents, are not empowered to make any order, command or instruction under the Defence Act, or the regulations made pursuant thereto, which would unduly, unreasonably or disproportionately infringe upon the plaintiff's constitutional rights; and any such purported order, command or instruction is unlawful, and *ultra vires* the powers vested in the first named defendant by the Defence Acts" [para. 9].

8. At para. 10 of the statement of claim it is pleaded that the Order "fails to vindicate the plaintiff's rights under the Constitution, and Articles 40.1 and 40.6 thereof, and is therefore null and void and invalid having regard to the provisions of the Constitution". The following particulars are given:

"(a) The Plaintiff is entitled to assemble peaceably and without arms, and to express himself freely, subject to the requirements of public order and morality.

(b) The protest of the 19th September 2018 was a peaceable assembly, and the Plaintiff intended to attend the protest peacefully and without any disturbance to public order and while off duty and in civilian attire.

(c) The Plaintiff's right to be treated equally along with other citizens and to attend a peaceably assembly was infringed by the Order, which required the plaintiff not to attend the protest on penalty of the commission of an offence under military law,

which could result in the trial by court-martial of the Plaintiff, and a possible sentence of imprisonment upon conviction.

(d) The Order, in prohibiting any attendance at any peaceful protest by off-duty members of the Defence Forces in civilian attire, including the plaintiff, constituted a disproportionate interference with the plaintiff's rights to freedom of expression, association and assembly and also amounted to a breach of the Plaintiff's right to be treated equally contrary to Article 40.1 and, by virtue of the legal sanctions attached to a breach of the said Order it was a breach of the defendant's obligations to the plaintiff pursuant to Article 40.3 of the Constitution."

9. It is further pleaded that "the Defence Acts ought to be interpreted in a manner which precludes the first named defendant, his servants or agents, from issuing orders, instructions or commands which unjustifiably and disproportionately interfere with the plaintiff's rights under Article 10 and Article 11 of the ECHR" [para. 12], and sets out particulars in this regard at para. 14 of the statement of claim.

10. At para.15 of the statement of claim, the plaintiff pleads *inter alia* that "...in addition, the Order remains in *de facto* force, with the effect that the plaintiff is unable to attend any such future peaceful protests or assemblies, under sanction of possible trial by court-martial for the disobedience of an order of a superior officer, an offence under military law, and a possible sentence of imprisonment upon conviction".

11. The reliefs sought by the plaintiff in the statement of claim are as follows:

"(1) A Declaration that the order or direction issued by the Deputy Chief of Staff of the Permanent Defence Force, dated 29 August 2018, that attendance by members of the Permanent Defence Force at unofficial parades and protests, in civilian attire, is unlawful and *ultra vires* his powers under the Defence Acts 1954-2007, and the regulations promulgated thereunder.

(2) If necessary, a declaration that the order or direction issued by the Deputy Chief of Staff of the Permanent Defence Forces, dated 29 August 2018, that attendance by members of the Permanent Defence Forces at unofficial parades and protests, in civilian attire, is repugnant to the Constitution of Ireland.

(3) A Declaration that the Plaintiff is entitled to attend lawful assemblies and/or protests, in civilian attire and while not on duty, and cannot lawfully be prohibited from doing so by the Defendants, their servants or agents.

(4) A Declaration that attendance by the Plaintiff at lawful assemblies and/or protests, in civilian attire and while not on duty, is not behaviour incompatible with military service.

(5) A Declaration that the Order or direction issued by the deputy Chief of Staff of the Permanent Defence Force, dated 29 August 2018, that attendance by members of the Permanent Defence Force at unofficial parades and protests, in civilian attire, is incompatible with the provision of the European Convention on Human Rights and Fundamental Freedoms, and in particular Article 10 and Article 11 thereof.

(6) A Declaration, pursuant to s.5 of the European Convention on Human Rights Act 2003, that any statutory provision or rule of law which purports to authorise the Deputy Chief of Staff of the Permanent Defence Force to prohibit attendance by members of the Permanent Defence Forces, in civilian attire, at lawful parades or protests, is incompatible with the European Convention on Human Rights and Fundamental Freedoms, and in particular Article 10 and Article 11 thereof.

(7) Damages to include punitive and/or exemplary damages...”.

The defence

12. The defence constitutes a full denial of the plaintiff’s claims. Two preliminary objections are made in relation to the plaintiff’s *locus standi*. Firstly, it is asserted that the

plaintiff “has no *locus standi* to bring the proceedings in circumstances where at all material times he was seconded to [PDFORRA] to act as its deputy general secretary, as that association, its servants or agents are prohibited pursuant to Article 28 of Defence Force Regulations S6 from sponsoring or resorting to any form of public agitation as a means of furthering claims or for any other purpose whatsoever and as such he could not partake in the protest on 19 September 2018” [para. 1].

13. Secondly, it is contended that the plaintiff has no *locus standi* to bring the proceedings “and/or the proceedings are a moot and/or theoretical and/or artificially created” in circumstances where the “Commanding Officer’s note of 29 August 2018 was addressed to personnel of 1 Armoured Cavalry Squadron by the Officer Commanding that unit and posted on the noticeboard for that unit. The note was not addressed to or provided to the plaintiff...” [para. 2]. It is contended that, for either of these reasons, the proceedings should be struck out.

14. At para. 4 of the defence, it is asserted that the “assembly and protest” on 19 September 2018 was “a demonstration relating to pay and conditions in the Defence Forces organised for the purposes of campaigning for increased pay. It was concerned with the allocation or proposed alternative allocation of scarce resources and lobbying for restoration of pay and conditions. The protest was thus a political demonstration”.

15. At para. 5 of the defence it was denied that the plaintiff was prevented from attending the said protest “in circumstances whereby had he a *bona fide* concern that this was an unlawful order addressed to him he could have invoked the provisions of s.114 of the Defence Act 1954 as amended”. That section provides for “redress of wrongs”, effectively a complaints procedure whereby if an officer “thinks himself wronged in any matter by any superior or other officer, including his Commanding Officer, he may complain thereof to this Commanding Officer and if, but only if, his Commanding Officer does not deal with the

complaint to such officer's satisfaction, he may complain in the prescribed manner to the [Chief of Staff] who shall inquire into the complaint and give his directions thereon" [s.114(1)]. The section sets out further provisions in relation to how such complaints are to be investigated and processed.

16. The defence traverses the matters set out in the statement of claim, and in particular pleads that "the Commanding Officer's note dated 29 August 2018 is not invalid having regard to the provisions of the Constitution including Articles 40.1 and 40.6 thereof and the role of the Defence Forces in the State..." [para. 10]. It is also pleaded that the Commanding Officer's note of that date did not "unreasonably or disproportionately" infringe upon the plaintiff's constitutional rights or the State's obligations under the European Convention on Human Rights ('**ECHR**') "in circumstances whereby the plaintiff is a serving member of the Defence Forces and/or an officer of [PDFORRA]..." [para. 11].

17. Extensive written and oral submissions were made by both parties in support of their respective submissions, and I will deal with these submissions later in this judgment.

The evidence

18. For reasons that will become apparent, the circumstances in which the order was given are of considerable significance in determining the legal issues between the parties. Accordingly, it is necessary to set out in some detail the essential points made by the witnesses on both sides.

19. What follows is a synopsis of the most important aspects of the evidence of the witnesses. While I have attempted to be concise and to set out only such detail as is necessary for understanding the context in which the Order was made and the reaction of the various parties to it, I should emphasise that I have considered all of the evidence of each of the witnesses, and have reread the transcripts of evidence for this purpose and consulted the digital audio recording where necessary.

The plaintiff

20. The plaintiff's current rank is "Company Sergeant". He enlisted in the Defence Forces in May 1990 and has risen to the rank of Company Sergeant, the highest level of the enlisted ranks. He has seen service on five overseas missions in Bosnia and the Lebanon, and it was not contested that his service over 32 years in the Defence Forces has been exemplary. In September 2017 he was seconded to PDFORRA as Deputy General Secretary of that Association, which is a full-time post.

21. In the Autumn of 2018, the plaintiff became aware of the event – to use a neutral word – planned for 19 September 2018, a couple of weeks before it was due to occur. Part of his role in PDFORRA was to monitor matters on social media relevant to the Association, and his evidence was that he became aware of the event through social media and certain other members mentioning to him that the event was imminent. His understanding was that an organisation called the "Wives and Partners of the Defence Forces" ('WPDF') and retired Sergeant Major Noel O'Callaghan and some other "veterans' bodies" were involved in the organisation of the event. He stated that the WPDF was "a new group that just suddenly appeared and their complaints seemingly mostly appeared around pay and allowances" [day 2, p.14]. The plaintiff did not know Sergeant Major O'Callaghan, having met him only once in passing, but stated that he "was held in high esteem across the Defence Forces...he would be well known". Sergeant Major O'Callaghan had been a sergeant major "in one of the big artillery regiments over in Athlone" and had become concerned about the level of pay and allowances for the young soldiers employed under him; "...he would have had people leaving the Defence Forces in his own unit because they just couldn't afford to stay" [day 2, p.17].

22. The plaintiff stated that he had been contacted by members of the Association asking if it were permissible for them to attend the event. The plaintiff's view was that members of the Defence Forces had had permission to go to similar parades in the past "as long as we

weren't going as PDFORRA reps, as long as we weren't marching under a banner or holding placards and we went as private individuals" [day 2, p.19, lines 24 to 28]. The plaintiff did not consider that there was any reason why members would not be allowed to attend the event as a private citizen.

23. The plaintiff indicated that it was his intention to go to the event himself. He "would have been curious to see what exactly [WPDF's] issues were because I suppose working in PDFORRA full-time, myself and Mr Guinan [the General Secretary of PDFORRA] would be dealing with a lot of pay and allowance issues anyway" [day 2, pp. 18-19]. He stated that he discussed his attendance "on more than one occasion" with Mr Guinan.

24. The plaintiff gave evidence in relation to his understanding of the position regarding attendance. He readily accepted that PDFORRA as an organisation could not be involved in the event, as s.28 of Defence Force Regulations S6 provides that "the Association [*i.e.*, PDFORRA] shall not sponsor or resort to any form of public agitation as a means of furthering claims or for any other purpose whatsoever". The plaintiff however referred to a letter sent by Mr Gerry Rooney, the General Secretary for PDFORRA, of 21 August 2008 to Lieutenant Colonel J White of the Conciliation and Arbitration (Military) HRM section in Defence Forces Headquarters regarding attendance at public meetings. That letter stated as follows:

"1. PDFORRA has received a query from a member regarding his entitlement to attend public meetings in support of the organisation/group 'save the cancer care services in Sligo General Hospital'.

2. This is a non-party political campaign which PDFORRA believes that all members of the Defence Forces could become involved with. However, before passing this view to the individual concerned it would be appreciated if this view could be confirmed by the military authorities...".

25. Lieutenant Colonel White responded by letter of 18 September 2008 as follows:

“ATTENDANCE AT PUBLIC MEETINGS – MEMBERS OF PDF

1. Further to your query dated 21 August.

2. There is nothing to preclude a member of the PDF attending public meetings in his or her own capacity as a private citizen, providing such activity is not captured by section 103(1) of the Defence Act.

3. Section 103(1) of the Defence Act 1954 to 2007 provides that ‘a member of the Permanent Defence Forces shall not join, or be a member of, or subscribe to, any political organisation or society or any secret society whatsoever’. The provisions of the Section are clear and, in effect, act as a prohibition to membership of political societies.”

26. The plaintiff also referred to an “information circular 6/2013” from PDFORRA which had been displayed on noticeboards in respect of the “ICTU day of action” in 2013. This related to a series of marches organised by the Irish Congress of Trade Unions at various locations “to highlight to government that the imposition of the €64bn bank debt on ordinary Irish citizens is wrong, has destroyed jobs, forced many into emigration and will depress the economy for year [sic] to come”.

27. The circular stated as follows:

“While it is contrary to the regulations for PDFORRA to attend the marches collectively under our own banner because it constitutes public agitation – there is nothing to preclude members attending public meetings in their own capacity as private citizens provided such activity does not involve membership of, or subscription to, political societies. This does not arise in this case.”

28. The plaintiff inferred from these past positions that “...you can’t march under a banner, you can’t go as an office holder, you can’t go as PDFORRA. You definitely can’t go

in uniform, absolutely not..." [day 2, p.21, lines 7 to 10]. The plaintiff's evidence was that "you can attend any public meeting as long as it is not captured by section 103" and that he would be entitled to attend a public meeting as a private citizen and not in uniform [day 2, p.24].

29. The plaintiff gave evidence as to how he became aware of the Order. Mr Guinan had received a text message with a screen shot of the Order as displayed on a noticeboard. He showed this to the plaintiff and commented that it precluded attendance at the event by the plaintiff. This occurred on 13 September 2018, six days before the event itself. The plaintiff had no doubt that the Order was referring to the event of 19 September 2018, although it did not do so explicitly. The plaintiff stated that he was absolutely clear that the order was a command which he was obliged to obey; the statement on behalf of Major General Cotter that "attendance in uniform or civilians at such events" was "NOT compatible with military service" meant that any party contravening the Order would face military sanction.

30. The plaintiff instructed the solicitors for the Association to write to the first defendant, the Minister for Defence, raising the issue. By an admirably detailed letter of 17 September 2018, the plaintiff's solicitors wrote to the Minister on behalf of the plaintiff indicating his desire to participate in the event on 19 September 2018, but stating that the plaintiff had become aware of the Order. The letter went on to state that "...it is our clear view that the issuing of such a direction to our client, and indeed others in the Defence Forces, is in breach of our client's rights to freedom of expression and freedom of association and peaceful assembly under the Constitution and European Convention on Human Rights". The letter set out at length the reasons for this view, and concluded by stating as follows:

"Our client asserts the foregoing right and entitlements as a private citizen and wishes to exercise his right to attend and participate in said parade. Our client is further an official of the Defence Forces Other Ranks Representative Association and is

mindful, in that connection, of the content of paragraph 28 of Defence Forces Regulation S6. It is submitted that said paragraph is, in any event, a clear violation of our client's rights and entitlements and represents a disproportionate interference with the guarantees of freedom of expression, freedom of peaceful assembly and association under the Constitution and as provided for under the European Convention on Human Rights.

As you know, the parade in question commences at 11.45 on Wednesday the 19th of September and therefore you might be good enough to revert to us by return with your confirmation that our client is free to attend and participate in said parade without any restriction whatsoever and shall not suffer or be exposed to any adverse consequence pursuant to the disciplinary processes under Military Justice or otherwise. In absence of hearing from you with your confirmation in that regard, our client cannot make any assumptions that you do so consent and shall therefore not attend the said event. In that instance, our client is of the view that there will have been a clear violation and breach of his rights and entitlements both under the Constitution and under European Law and our standing instructions are to arrange for issue of relevant proceedings seeking such orders and reliefs together with damages as Counsel may direct herein.

We accordingly look forward to hearing from you by return.”

31. By a letter of 18 September 2018, Mr David Lawler, Principal Officer of the Defence Forces Personnel Policy Branch in the Department of Defence, replied to the plaintiff's solicitor's letter. In particular, Mr Lawler stated as follows:

“Having regard to the timeframe for reply imposed by your letter, it has not been possible to establish whether a direction as intimated in your letter was issued.

However, for the avoidance of doubt, the extant legal position is as follows. Section 103 of the Defence Act 1954 prohibits members of the Permanent Defence Force

from membership of, or subscription to, any political organisation or society; DFR A9 prohibits participation by uniformed members of the Defence Forces in any ‘demonstration, meeting or function of a political character’ ...; DFR A7 prohibits at any time unauthorised communications that pertain to service matters by members of the Defence Forces. DFR S6 prohibits PDFORRA from sponsoring or resorting to any form of public agitation as a means of furthering claims or for any other purpose whatsoever.

32. By letter of 19 September 2018, the plaintiff’s solicitors replied to Mr Lawler’s letter.

The letter stated, *inter alia*, as follows:

“Please be good enough to advise if our client can attend the parade. Your letter does not appear to contain any specific prohibition but is however ambiguous and certainly does not confirm that he can attend. In any event, the attached document [*i.e.*, the Order itself] makes it clear that he is not to attend thereby casting doubt on the legality of this document and the direction therein contained”.

33. No substantive response was received to this letter, and the plaintiff accordingly did not attend the event which duly took place on 19 September 2018.

34. In his evidence, the plaintiff stated that he had never been a public spokesperson for PDFORRA. Not only had he not been invited to speak at the event, he had in fact not been invited to attend, and none of the organisers would have known in advance that he was going to attend. He stated that, as far as he was aware, there were subsequent events in Cork and Galway, but the plaintiff did not consider that he could attend those events due to the Order.

35. The plaintiff was cross-examined at length by counsel for the defendants. I have summarised below the main points which emerged from cross-examination:

(i) the plaintiff was cross-examined in relation to the circumstances in which he became aware of the event on 19 September 2018, *i.e.*, through social media and other contacts;

(ii) the plaintiff accepted that the notice of 29 August 2018 was addressed to 1 Armed Cavalry Squadron and not to any other person or unit, and that Commandant Sharkey was not his commanding officer;

(iii) the plaintiff was questioned closely as to his motivation in attending the event.

The plaintiff said that he was curious to see what the event was about, and regarded it as an opportunity to meet up with some old friends. He said that it was not his intention to offer personal support for the event [day 2, pp. 61 to 62];

(iv) the plaintiff insisted that the character of the event was that of a “parade” as it had been advertised on social media, although he accepted that it was described variously in the statement of claim and replies to particulars as a “peaceful assembly” and a “protest”. He did not accept the suggestion of counsel for the defendants that “it was concerned with ... improving pay and conditions [and was] clearly a protest and no other description is reasonable or appropriate?” [Day 2, pp. 67 to 68];

(v) the plaintiff said under cross-examination that, while it was an issue for the wives and partners and other organisers of the event to address, it was probably correct to say that the aim of the event was to advocate change in the pay and conditions of members of the Defence Forces and thus to seek to change government policy: see day 2, p.78, lines 7 to p.79, line 8;

(vi) the plaintiff did not at first accept that his attendance at the event must be indicative of his support for the aims and purpose of the event. His view was that he was entitled as an ordinary citizen to attend to gather information, given his interest in the subject of the event;

(vii) he did however accept that, in order to change pay and conditions, one would have to change government policy, and to the extent that he supported this aim, it followed that his attending the event was an expression of support for the objective of the event, which was to advocate for a change in government policy: see in particular day 2, p.88;

(viii) the plaintiff did not accept that his attendance at the event must be construed as an attendance in his capacity as Deputy General Secretary of PDFORRA; the plaintiff stated that he relied on the letter of 18 September 2008 from Lieutenant Colonel White referred to above in that regard: see day 2, p.90;

(ix) the plaintiff emphatically rejected the suggestion that his attendance at the event “would have been seen and could only have been seen as support by PDFORRA for the event” [day 2, p.94, line 26 to p.95, line 3];

(x) the plaintiff was cross-examined at length as to whether the event was a “political event” which, in the view of Major General Cotter “would undermine the standing of the Defence Forces in the eyes of the public and the government”. The plaintiff disagreed with this proposition, and with the view of Major General Cotter that “the attendance of members of the Defence Forces would have had an effect on discipline ... in the Defence Forces”; the plaintiff’s view was that this would not occur if the members were attending in civilian attire: see day 2, pp. 128 to 129;

(xi) the plaintiff was also cross-examined in relation to whether or not attendance at the event could be in contravention of the oath which must be sworn by each member of the Defence Forces pursuant to s.58 of the Defence Act 1954 as amended. The oath for enlisted personnel, which is set out in Part II of the 8th Schedule to the Act, is as follows:

“I, _____, do solemnly swear (or declare) that I will be faithful to Ireland and loyal to the Constitution and that while I am a [member] of the Defence Forces I will obey all lawful orders issued to me by my superior officers and that while I am a [member] of the Permanent Defence Force I will not join or be a member of or subscribe to any political organisation or society or any secret society whatsoever and that, if I become a [member] of the Reserve Defence Force, I will not, while I am a [member] of the Reserve Defence Force, join or be a member of or subscribe to any secret society whatsoever.”

(xii) the plaintiff accepted that the event was a “political event” but did not accept that his attendance at the event constituted “subscribing to” a “political organisation or society” [day 2, p.135, line 27 to p.136, line 14];

(xiii) the plaintiff agreed with counsel for the defendants that his attendance at the event “would have amounted to you associating yourself with the wives and partners organisation ... attending at that event would have been you associating yourself with that political association?”: see p. 136, lines 15 to 24;

(xiv) the plaintiff was cross-examined in relation to the fact that he chose not to avail of the “redress of wrongs” procedure under s.114 of the Act, and disagreed with the suggestion that this would have resulted in an accelerated resolution of the dispute: see day 3, pp. 24 to 25.

Corporal Gerard Guinan

36. Mr Guinan – as he was addressed throughout his evidence – is a corporal in the Defence Forces. He has 32 years’ service, and in 2014 was elected as Deputy General Secretary of PDFORRA. In 2017 he was elected as General Secretary of PDFORRA.

37. Mr Guinan gave evidence in relation to the function and workings of PDFORRA generally. He stated that the Constitution of the Association prescribes that the only persons

allowed to speak on behalf of the Association are the General Secretary and the President of the Association, although an additional spokesman could be appointed with the permission of the Minister.

38. Mr Guinan did not accept that, if the plaintiff had attended the event on 19 September 2018, his attendance must be regarded as an endorsement by PDFORRA of the views expressed at the event. He rejected any suggestion that the attendance of Mr Bright in a personal capacity should be equated with the attendance of PDFORRA: see day 3, p.45.

39. Mr Guinan stated that he had taken part in the ICTU day of action in 2013 – see para. 26 above – by attending a march in Dublin. He also attended certain events to protest against barracks closures in 2012; he gave evidence that he considered that he was entitled to do so as “a citizen”. As far as he was aware, no one had ever been disciplined for attending these events, notwithstanding that they required a change in government policy in relation to barracks closures.

40. I asked Mr Guinan whether, given that he is a nominated spokesperson for PDFORRA, he would consider that his presence – had he chosen to attend – at the event of 19 September 2018 “would be seen as having lent the support of PDFORRA to the event?” Mr Guinan acknowledged this as a “hard question”, but said that he would not consider himself constrained from attending the event because he was a nominated spokesperson for PDFORRA: see day 3, pp. 52 to 53.

41. Mr Guinan outlined the manner in which he became aware of the notice of 29 August 2018, and his reaction to it (“shocked...to discover actions I had undertaken could have left me liable to be charged [under military law] ...”): see day 3, p.56. His understanding had been that the position was as set out in the letter from Lieutenant Colonel White in 2008 “that people could attend public events in their private capacity while in civilian attire, providing it wasn’t in contravention with para. 103” [day 3, p.60, lines 18 to 22].

42. Mr Guinan stated that s.114 of the Act “generally deals with minor issues. It is not built to deal with an issue of interpretation...it is of its time. It is not designed to deal with an issue like this I would say...” [day 3, p.62, line 22 to p.63, line 1].

43. On cross-examination, Mr Guinan was pressed as to whether he or the plaintiff, when attending an event concerning pay and conditions, could ever be considered not to be representing PDFORRA, which Mr Guinan accepted was prohibited by its constitution from engaging in political activity. The point was made to Mr Guinan that he and the plaintiff both habitually wear civilian clothes at work rather than a uniform. When asked how members of the Defence Forces would know that Mr Guinan, attending an event in civilian attire, was there in a private capacity as opposed to as an officer of PDFORRA, Mr Guinan stated “...if I am an officer of PDFORRA I am generally talking but if I am in a private capacity I am not talking, I am the same as Joe Public” [day 3, p.82 to p.83]. He went on to say that “...the difference is when I am there and I am not talking I am there as a casual observer...” [day 3, p.86, lines 14 to 17].

44. It was put to Mr Guinan that if it were stated in the media that the General Secretary or Deputy General Secretary of PDFORRA were present at the event, “...that gives the impression that you are supporting or endorsing that protest, that is the risk?” I asked counsel whether it followed from this “that nobody who is a member of PDFORRA, certainly none of its officials could ever go to a meeting like that no matter how curious they were about what would be said?” Counsel said that if the event fell foul of s.103, then such a person could not attend the event, and that – in the court’s words – “in all circumstances it would have been inappropriate for Mr Guinan or Mr Bright or possibly any member of PDFORRA to be there?” Counsel confirmed that this was the defendant’s position [see day 3, pp. 87 to 88].

45. Mr Guinan was also cross-examined about whether it was appropriate to rely on Lieutenant Colonel White’s letter of 2008 as a statement of general policy, or whether it was

specific to the situation which arose in 2008 in relation to the cancer care services in Sligo General Hospital. Reference was also made to the events concerning barracks closures; it was put to Mr Guinan that these were public meetings, but not protests or marches. While Mr Guinan accepted this, he pointed out that the persons attending such meetings “were [there] to try and influence policy [and] to try and change people’s minds” [day 3, pp. 99 to 100].

46. Mr Guinan was challenged about the fact that the plaintiff did not avail of the redress system. Mr Guinan expressed views in accordance with those expressed by the plaintiff in espousing his view that legal proceedings were more appropriate.

47. On re-examination, Mr Guinan was asked for his view of para. 27(4) of Regulation S6 of the Defence Forces Regulations, which deals with PDFORRA. That sub-Regulation states that “...no public statement or comment concerning a political matter shall be made by the Association”. Mr Guinan expressed the view that “political” in this context meant “party political”, and that he could say that “the Government is not doing enough” without it being a political statement; “...it is more a political statement in the context of policy, that you are not looking to overturn the Government as such” [day 3, p.110, line 24 to p.111, line 5].

Captain Tom Clonan

48. Captain Tom Clonan is a retired army officer who served in the Defence Forces from 1989 until 2000. He served overseas in the Middle East and as an election supervisor in Bosnia. He was promoted from First Lieutenant to Captain in 1997, and was appointed to Staff Officer to the Chief of Staff in Defence Forces Headquarters. Having retired in 2000, he entered the academic world, obtaining a doctorate, and has written and broadcast extensively in relation to military matters. Shortly after the hearing in the present matter, he was elected to Seanad Éireann as an independent senator.

49. Captain Clonan gave evidence for the plaintiff. He had actually attended the event itself, having been alerted to it through a Facebook page entitled “Respect and Loyalty” set

up by retired Sergeant Major Noel O’Callaghan. Captain Clonan happened to be working nearby, and walked to the event. He was wearing a suit. His evidence was that “the purpose of the parade was to raise awareness of the pay and conditions that members of the Defence Forces were experiencing at the time” [day 3, p.118, lines 19 to 21].

50. Captain Clonan stated that he was “the youngest person there by at least a decade”. The age profile of participants was people in their 50s and 60s or older. Some were wearing a blue blazer of the Irish UN Veterans’ Association; others were wearing suits. In Captain Clonan’s words, the participants were “conservatively dressed”. There were stewards present, and the atmosphere was “very calm...more like a reunion”. Sergeant Major O’Callaghan and a retired soldier and journalist Declan Power “spoke briefly”, and letters were handed over to a cross-party representation of TDs who came out to meet the group. It was, in Captain Clonan’s words, “...a very quiet affair...old school...”. The purpose of the event was “...not to create a ruckus or put anybody under pressure, it was to raise awareness...” [day 3, pp. 121 to 127].

51. Captain Clonan expressed his views, from his experience, as to the nature of the Order and its applicability. The defendants objected to this evidence, given that Captain Clonan had retired approximately 18 years prior to the Order being given. Captain Clonan contended that his expertise in military communications – as recently as 2019 he had given a lecture to the Command staff about their communications culture – as well as his personal experience enabled him to address these matters authoritatively.

52. The Order was viewed by Captain Clonan as “an absolutely definitive statement...a categorical imperative that is something not to be ignored”, emphasised in particular by the use in the Order of block capitals. He expressed the view that the Order was essentially to be regarded as Major General Cotter’s order, albeit it was expressed as an order from Commandant Sharkey: “...only those orders that are meant for transmission are transcribed

so therefore it would be in writing. Then it would be communicated to the various brigade adjutants' office to be transmitted down to the unit adjutants and to be displayed or to [be] published" [day 3, p.138, lines 17 to 22].

53. Captain Clonan was pressed in cross-examination in relation to the nature of the event. He accepted that "the purpose of the event was to push forward with improved pay and conditions for members of the Defence Forces", or, as he put it, to "raise awareness". He did not accept that the objective of the event was to change government policy on pay and conditions for the Defence Forces; he stated that the objective "...was to ask the Government to enact or implement their policy because the Government stated policy has been for many years now pay restoration and to ... review and enhance the pay and conditions of serving soldiers" [day 3, p.26, lines 3 to 7]. He stated that "...it wasn't a protest to try to change government policy. Really it was an event I think on the part of those who organised it to respectfully remind [the Government] of the commitments they had made to serving soldiers which actually haven't been honoured, as yet" [day 3, p.26, lines 12 to 17]. Captain Clonan drew a distinction between the objective of the event, which he maintained was to change government practice, and an intention to change government policy.

54. It was emphasised by Captain Clonan that the public representatives who accepted the group's letters were from all political parties; the event was not targeted at government parties. In that sense, it was not partisan. The gardaí did not allocate any extra resources to the event; the normal complement of gardaí at the gates of government buildings dealt with the event, and the participants chatted to the gardaí in a "convivial...collegial..." manner.

55. It was put to Captain Clonan that "the direction given by Major General Cotter and referred to in Commandant Sharkey's notice was not an order...by reason of the command structure set out in the Defence Forces Act [sic], the Chief of Staff and indeed the Deputy Chief of Staff do not have an intrinsic authority to issue a lawful order, they do not have a

command function...they can issue directions and when it is transmitted down to the General Officer Commanding...they can issue orders to the soldiers in their formation. That is what happened here that I think it was General Mulligan who issued an order to Commandant Sharkey who in turn issued an order to 1 Armoured Cavalry Squadron” [day 4, pp. 42 to 43].

56. Captain Clonan disagreed with the analysis. As he put it “...if I make an informal variable request to a subordinate, that has the lawful effect of orders. If I write it down it has a greater status. If it comes from the General Staff and appears on the unit noticeboard as consistent with SD1 or the manual of staff duties with block capitals, it is very clearly an explicit order. If it appeared in the 1st Armoured Squadron it appeared everywhere because that is the transmission of orders and that is how the Defence Forces operate” [day 4, pp. 45 to 46].

Commandant James Sharkey

57. Commandant James Sharkey was the officer commanding 1 Armoured Cavalry Squadron at the time of the events at issue in these proceedings. He has since moved on to another command post. Commandant Sharkey had, at the time of the trial, 22 years’ service, mostly in operation and command appointments in Dublin and the Curragh, with multiple deployments to the Middle East and Africa. He was appointed to the role of Commandant in 2015.

58. Commandant Sharkey referred to the Unit Commander’s Conference held on 24 August 2018. General Mulligan and his staff office of Brigade Headquarters were there, together with all the unit commanders in the Defence Forces training centre. Approximately 25 to 30 officers were present.

59. Commandant Sharkey stated that General Mulligan referred to unofficial protests or parades, and stated that “a serving soldier should not attend such parades and events because it is not conducive to military service”. Commandant Sharkey stated that General Mulligan

did make reference to the “Wives and Partners of the Defence Forces” event that was upcoming. In Commandant Sharkey’s view, the imminence of this event was the reason why General Mulligan expressed the view he did in relation to the attendance of serving soldiers at unofficial events.

60. Commandant Sharkey stated that, following the meeting, he made his “Commander’s notes”, and in addition made the note which comprised the Order “just to remind all troops that they are not to attend such events”.

61. Commandant Sharkey stated that the Order was “addressed to the troops that were under my command...it was them to whom I was addressing this information”. In response to a question from the court, Commandant Sharkey stated that he was not aware that any of the other unit commanders put up a notice like this, but pointed out that he at the time did not have access to his troops on a day to day basis, whereas some of the other unit commanders might not necessarily have had that problem.

62. The defendants’ counsel asked Commandant Sharkey whether there was any need to mention in the Order “any specific parade or protest”. Commandant Sharkey said that there was no such need; “...it was my interpretation and this would be the same information that I would give out for all – to troops about all parades and protests” [day 5, p.21, lines 10 to 13].

63. Commandant Sharkey addressed certain aspects of the notice. The use of block capitals was for emphasis, and was “just normal military writing...”. As regards use of the phrase “civilians”, Commandant Sharkey stated that “...to me there is no difference whether you wear the uniform or you’re not wearing the uniform you always [represent] the organisation. That is the intent behind when I say it.” [Day 5, pp. 22 to 23].

64. Commandant Sharkey stated that the notice applied to all members of 1st Armoured Cavalry Squadron, “the troops that are under my command”. He stated that “...I don’t have command over anybody else. So, to me, it is not an order for anybody else within the Defence

Forces Training Centre or within the Defence Forces”. When asked what was the effect of the notice on Sergeant Bright, Commandant Sharkey stated “...to me, ...it should have no effect on him...I have no command over him”. [Day 5, p.24]. Commandant Sharkey indicated that, if a person under his command had attended the event, he would have considered that that person had disobeyed an order.

65. On cross-examination, Commandant Sharkey accepted that Brigadier General Mulligan’s order applied to everyone – not just his command. His view was that a soldier unaware of the Order was still not entitled to attend the event, as all soldiers should know that attendance at such an event was not compatible with military service [day 5, p.34]. He was asked whether a soldier not in Commandant Sharkey’s unit who saw the notice would understand that they should not attend the event; Commandant Sharkey accepted this [day 5, pp. 35 to 36]. It was put to Commandant Sharkey that the plaintiff claimed that a direction was given by Major General Cotter that all members of the Defence Forces could not go to this sort of event, and that this direction applied to him; Commandant Sharkey accepted that this must be correct [day 5, p.37].

66. Commandant Sharkey was probed on his views as to the extent to which a member of the Defence Forces attending a protest might be deemed to agree with the views espoused at the event. Commandant Sharkey’s view was that one would be taken as subscribing to the beliefs of the organisers if one attended such a meeting, albeit that he acknowledged a difference between joining an organisation and attending a meeting organised by that organisation. He made the point that the plaintiff would have been “well aware” of the intentions and aims of the WPDF. He stated that someone would not have to agree with all of the views of the organisers to be “subscribing” to those views: [day 5, p.53, lines 18 to 15]. He expressed the view that “it’s the attendance for me that is key” [day 5, p.54, line 17].

Major General Kevin Cotter

67. By the time of his retirement in April 2019, Major General Kevin Cotter had served for 44 years in the Defence Forces, having joined in 1974 straight from school. He spent 25 years in the Signal Corps, and 3 years in the Command and Staff School of the Military College. Ultimately, he was posted to the European Union military staff in Brussels, serving there for 3 years, returning to Ireland in 2014. In the following year, Major General Cotter was appointed to the role of Deputy Chief of Staff (**‘DCOS’**) - one rank below the Chief of Staff, the highest rank in the Defence Forces. He participated in 13 overseas trips or secondments, variously in the Middle East, the Balkans, Africa and Brussels; in the course of his long and distinguished career, he served with the United Nations, the Organisation of Security & Cooperation in Europe (**‘OSCE’**), NATO, and the European Union.

68. In his evidence, Major General Cotter described the command structure of the Defence Forces and the various meetings involved. Defence Forces Headquarters is the institution which presides over the military element of the Department of Defence, and is operated by the General Staff, which comprises the Chief of Staff, 2 DCOSs – one concerned with “support”, the other with “operations” – and the Assistant Chief of Staff. Major General Cotter stated that the General Staff “is entrusted with the strategic direction of the Defence Forces”, and in this regard “provides policy in relation to the Defence Forces” [day 6, p.13, lines 12 to 19]. He confirmed that “the General Staff do not have a command function...the command function goes from the Supreme Commander, which is the President, through the Government *via* the Minister for Defence, to the General Officer Commanding...” [day 6, p.16, lines 9 to 14].

69. Thus, military command does not flow through the Chiefs of Staff; the Report of the Commission on the Defence Forces, published in February 2022, comments at p.56 of the report that “...while the Chief of Staff is the highest ranking officer and therefore has *de facto* moral authority, *de jure* command is dispersed among a number of lower ranking officers.

This unusual, and potentially confusing, structure, diverges from what is considered best practice internationally and underlines the need to modernise the current system”.

70. The court asked Major General Cotter whether this meant that “the DCOS cannot order anybody lower in the structure of the Army to do something”. Major General Cotter replied “that is correct”. I asked Major General Cotter whether, if he had encountered Sergeant Bright on the parade ground and told him, in advance of the event, that he should not attend it, and subsequently it transpired that Sergeant Bright had attended the event, the plaintiff would be in breach of military discipline. Major General Cotter replied “...not that I am aware of because I haven’t the authority to give an order...” [day 6, p.21, lines 7 to p.22, line 15].

71. Major General Cotter referred to Public Sector pay talks convened in 2017, in which the General Staff, PDFORRA and RACO – the Association for Commissioned Officers – would have been represented by the Department of Defence. In mid-2018, the General Staff became aware of ongoing and planned protests in relation to pay and conditions in the Defence Forces. Major General Cotter’s evidence was that the General Staff, prior to a meeting of 23 August 2018, was aware of the planned event on 19 September 2018 and who the organisers were. He said that he was concerned that “it would be a political event and that it would have political characteristics...we assessed the event as political and we would have a concern that members of the Defence Forces would attend. It would be contrary to their oath. It would be contrary to loyalty to the Constitution...” [day 6, p.27, line 26 to p.28, line 9].

72. On 23 August 2018, there were in fact two meetings: the “General Staff and Formation Commander’s Conference” at 8.30am and the “General Staff/Formation Commander’s monthly meeting” at 13.00. A minute of the former meeting was produced at the hearing; the minute was completely redacted save for the following paragraph:

“Closing remarks

D COS (Sp)

D COS (Sp) indicated that the march that is being organised for the 19th of Sept is not compatible with our service in civilian clothing or when in uniform.

D COS (Sp) stated that the organisers of this event were somewhat blurring the message by calling this event a parade. He stated that he clearly understands some of the frustrations that pertain but that he requested all personnel to stay away from this event”.

73. Likewise, a minute of the meeting of 13.00 hours was similarly redacted, save for this paragraph:

Risk

- Parade on 19 Sep: COS clarified that DF pers in or out of uniform cannot take part as this is a political event”.

74. Major General Cotter was asked by counsel for the defendants how participation by members of the Defence Forces could affect the morale of the Defence Forces. His reply was as follows:

“If attendance was contrary to the order, if somebody attended it would be a visible demonstration that people could do as they please – they could not obey an order – and that would lead to a polarisation where various elements could do as they please. That polarisation would be in direct opposition to each other. And if you have a polarised Force, the cohesion of the Force is no longer there. That lack of cohesion would affect the mission, if you were given a mission to carry out. And if you couldn’t conduct your mission, you would not be in a position to carry out the roles that the Government assigned to the Defence Forces.” [Day 6, p.43, line 20 – p.44, line 3].

75. This answer was expanded in response to a question from the court:

“[The court]: One understands readily that if soldiers disobey an order not to attend a parade like that, that that can be very serious in terms of morale and so on. But when morale was initially mentioned, I had thought that what you meant was that even if no order had been made at all, the very fact of soldiers attending, whether in uniform or in civilian attire, at the parade would have been deleterious to morale. So leaving aside the question of whether or not disobedience of an order was involved, do you consider that attendance at the parade, even in civilian attire, *per se* was damaging to morale?”

A. Yes, indeed, Judge, yes.

[The court]: And why?

A. Because, in our oath, we have given an undertaking that we would not subscribe to political organisations. This event was a political event. Our concern was that the Defence Forces would be dragged into the political environment and, if personnel attended that event, it would be highlighted, it would percolate throughout the Defence Forces, it would percolate throughout the State, it would percolate throughout the Government and the population would see it. That would come back into morale where an individual or a group of individuals could highlight the fact that members of the Defence Forces were going against their oath, against the Constitution. So that was our concern in the area.” [Day 6, p.44, line 8 to p.45, line 6].

76. Major General Cotter confirmed in evidence that his direction was given orally at the General Staff Conference, and that he expected that direction to be followed. A minute of a meeting on the following day – 24 August 2018 – was produced. This was entitled **GOC &**

UNIT/GP COMMANDER'S CONFERENCE 24 AUG 2018 – (WEEK 34), and the only unredacted paragraph in the minute reads as follows:

“Parade on the 19 Sep: clarified that the parade is a political event and the message from the GS is that participation in such an event is not commensurate with the oath taken by serving members of the DF. Uniformed participation is not allowed.”

77. Brigadier General Mulligan, who was “GOC DFTC” – the General Officer Commanding the Defence Forces Training Centre – was specifically noted as present at the meeting at 13.00 on 23 August 2018, and the meeting of 24 August 2018 was General Mulligan’s meeting with his unit commanders, of which Commandant James Sharkey of 1 Armoured Cavalry Squadron was one. Commandant Sharkey was at the meeting, although his attendance is not recorded on the available minute. Major General Cotter pointed out that the direction as given in the minute of 24 August 2018 in the foregoing paragraph above is not in accordance with the directions given at either of the meetings the previous day, to the extent that it might suggest that only “uniformed participation” was not allowed: [day 6, p.68, line 22 to p.69, line 3].

78. In cross-examination, Major General Cotter confirmed that the approach to be taken in relation to participation in the event “would have been discussed with the Chief of Staff and the other members of the General Staff”. Although the discussion was not minuted, Major General Cotter stated that “we would have discussed it extensively...” [day 6, pp. 73 to 74].

79. Major General Cotter accepted that Commandant Sharkey’s order was an accurate representation of his direction, and that he intended the message to go out to all members of the Defence Forces that they should not attend the event. In response to questioning by counsel for the plaintiff, Major General Cotter stated that “...if you did attend, you would be

subject to military discipline...it was a direction that had to be clearly understood". The following exchange between counsel and the witness took place:

“Q. ...Are you saying that your direction can accurately be described as no more than a request, or are you saying that your direction should accurately be described as a clear instruction that had to be followed?

A. I expected my direction to be clearly understood and to be followed by all members of the Defence Forces.

Q. Right, and there would be repercussions if it wasn't?

A. Yes” [Day 6, p.83, lines 2 to 10].

80. Specifically in relation to the plaintiff, the Major General was questioned as follows:

“Q. But if you became aware that somebody actually weren't [sic] just based in McKee Barracks but you knew about and saw the direction as captured in Commandant Sharkey's note, I presume that you would be more than not just unimpressed [sic]?

A. Yes, I would have caused it to be investigated.

Q. Yes, and possibly –

A. Disciplinary action, perhaps – perhaps would follow on.

Q. So we can take it, therefore, that Sergeant Martin Bright, on becoming aware of the making of the direction and of Commandant Sharkey's note, actually he had no choice if he wanted to stay the right side of the military law, he wasn't able to go?

A. Yes.” [Day 6, p.88, line 3 to 16].

81. Major General Cotter was cross-examined extensively as to the proposition that someone who attends at a parade or a protest should be deemed to “subscribe” to the aims of the organisers, and that a reasonable observer seeing someone attending at such an event would be entitled to assume that such a person was lending their support to the aims of the

organisers. Major General Cotter agreed that these propositions reflected his own view, and that a soldier attending an event such as the WPDF event would be acting contrary to his or her oath [day 6, pp. 91 to 92]. He expressed the view that attendance at the barracks closure meetings in 2012 was “not appropriate”; the ingredient that would “render an event impermissibly political” – in the words of counsel – was if the event sought to change government policy and practice [day 6, pp. 99 to 100].

82. Major General Cotter was pressed on his view of the meaning of “subscribe to” which appears in both s.103 and the oath for enlisted members. He expressed the view that “subscribe”, in the phrase “subscribe to any political organisation”, meant “agree with and support the aims of...”. He accepted that a soldier is entitled to hold personal political views “but when it is demonstrated in public it becomes a political issue in the political arena and it is contrary to the oath...” [day 6, p.116, lines 23 to 25].

Other witnesses

83. Both sides proffered evidence from persons unconnected with the Defence Forces in relation to the matters at issue, although the respective witnesses came from different perspectives. Mr Emmanuel Jacob gave evidence on behalf of the plaintiff. Mr Jacob is a former soldier and has been active in military trade union activities since the late 1980s. He is president of EUROMIL, the European Organisation of Military Associations and Trade Unions, and has occupied that office since September 2006. EUROMIL is an umbrella organisation comprising 32 European Military Associations and Trade Unions. Professor Ben Tonra is a political scientist who is head of international relations at the UCD School of Politics and International Relations and teaches, researches and publishes in, *inter alia*, European and Irish foreign, security and defence policy.

Mr Emmanuel Jacob

84. Mr Jacob joined the Belgian armed forces in 1979. Having become involved in a Belgian military trade union, he worked full-time for that union from 1999 to 2011, while continuing his military career. He served as an “adviser human resources and education” at the cabinet of the Belgian Minister for Defence from January 2012 until October 2014. From then until December 2018, he was policy officer at the cabinet of the Belgian Secretary of State for Foreign Trade and later an adviser at the cabinet of the Belgian Minister for Home Affairs and Security until October 2020.

85. EUROMIL is described by Mr Jacob as “the voice of European soldiers on an international level. Its core mission is to promote the professional and social interests as well as the fundamental rights and freedoms of European soldiers”. It is the “main Europe-wide forum for cooperation among professional military associations on issues of common concern”. In his written report for the court, Mr Jacob sets out the goals of EUROMIL, which include “promoting the fundamental rights and freedoms of members of the armed forces in Europe”, ... “the inclusion of military personnel in European social policy” ... and “...the general, non-material, social and professional interests of active and former military personnel, their families and surviving dependants”. EUROMIL is comprised of organisations – as opposed to individual members – and both PDFORRA and RACO are members of the organisation.

86. In relation to the “fundamental rights and freedoms of members of the armed forces” to which Mr Jacob refers as one of the goals of EUROMIL, Mr Jacob referred to Articles 10 and 11 of the European Convention on Human Rights in the context of freedom of expression, freedom of assembly and freedom of association rights. EUROMIL’s position is that these articles do not exclude military personnel from the right of association. In particular – as Mr Jacob puts it at p.2 of his report – he is of the view that “almost everywhere in Europe participation at demonstrations is allowed, however never in uniform

and during service time”. He goes on however to comment that “the political neutrality is always an issue of concern. And that is the main problem. There is no clear definition on this and some look for example at trade union activities as a political issue. In other cases, the ability to demonstrate is or was not the problem, but rather it was statements made by an individual that created problem, due to being perceived as political in nature or out of the scope of their competencies”.

87. Both in his written report and in his evidence to the court, Mr Jacob referred to the treatment or attitude of countries affiliated to EUROMIL towards demonstrations by or on behalf of members of the military in relation to the issue of pay and conditions. His evidence to the court was that “almost everywhere in Europe participation at demonstrations is allowed by members of the defence forces”; he stated that “...what we see in practice and what our member associations confirm also is that the general context in European countries is that soldiers are allowed, not in uniform, not during working time, and not mentioning the fact that they are in the military or trying to represent the military as such that in that case they are allowed to participate at demonstrations, at protests. And of course you have then your responsibility as a citizen and in case there is something where you misbehave this consequence as a citizen can also have a military consequence. It can be that at that point you have a disciplinary problem” [day 4, p.68, lines 13 to 25].

88. Mr Jacob’s report surveyed the experience of various EUROMIL affiliated countries in relation to demonstrations by or on behalf of military in a number of countries. Mr Jacob attended many of these demonstrations, and spoke at some of them. On p.5-6 of his report, he stated as follows:

“For the purposes of this case, I have brought together details of those countries in Europe where involvement in civilian attire in demonstrations for military personnel

is permitted and I am able to say that the below is a synopsis where the right to assemble is permissible in the following jurisdictions.

- (i) Belgium
- (ii) Denmark (can even wear uniform). There is no right to strike but sympathy strikes are legally possible but rarely happen due to heavy levels of industrial peace in that country.
- (iii) Germany.
- (iv) Greece.
- (v) Italy.
- (vi) Poland (yes, unless on active service).
- (vii) Portugal (yes, if not speak or organise it).
- (viii) Netherlands (can even wear uniform).
- (ix) Serbia.
- (x) Slovakia.
- (xi) Spain.
- (xii) Sweden (can even strike but never used but demonstrations are possible and occur).
- (xiii) Romania.”

89. In the reference to Serbia in his report, Mr Jacob stated that professional members of the military in that country could take part in protests relating to the rights of employees, and that this type of participation in protests “is nowhere prescribed [sic] or prohibited as long as the basic restrictions are respected: that the protest is not of a political nature that the uniform is not worn or the features of the army stand out, that the organiser is a trade union organisation”. I put it to Mr Jacob that there was an issue in the present proceedings “as to whether or not this event could be described as a political event. It is not a party political

event in that sense, in the sense of supporting a particular political party but there is a contention on behalf of the defendant that it could be described as a political event. I just wondered what you meant by a protest of a political nature in relation to Serbia. Does the issue arise as to whether or not an event or protest in relation to pay and conditions could be considered of a political nature?"

90. In response, Mr Jacob stated his opinion that "I don't see in one of the countries that we are dealing with that a protest concerning pay, that this would be seen as a political event". He was asked by the court if that would be so "even though the purpose of [the protest] might be to persuade the Government to either change policy or to adhere to its existing policy or perhaps even to advocate that if they didn't do one of those two things, that perhaps people should consider changing the Government?" Mr Jacob in response stated as follows:

"I think that asking to review a system on pay conditions, that this is not harming, this is part of the demand and such a demand very often will only come on the table if the social dialogue, the collective bargaining on the issue did not work or work insufficiently. In all these times and in all the demonstrations or rallies that I mentioned in the report, as far as I know I have never seen a goal for government to change or to disappear or a goal from member associations or military demonstrating that governments should disappear and that it is time that party instead should start now ruling the country. This is not part of these kind of demands".

91. Mr Jacob was asked in general in relation to the countries with which EUROMIL is concerned whether a parade, event or protest in relation to pay and conditions such as in the present situation would be seen as political. Mr Jacob answered emphatically in the negative.

92. Mr Jacob referred to recommendation CM/REC (2010) 4 of the Committee of Ministers to Members States on Human Rights of Members of the Armed Forces of

24 February 2010. Mr Jacob accepted that this was a recommendation from the Council of Ministers and did not have force of law, but suggested that it “is at least a morally binding document for Member States of the Council of Europe” [day 4, p.106, lines 4 to 5]. He referred particularly to section K of this document, which states, *inter alia*, as follows:

“K. Members of the armed forces have the right to freedom of peaceful assembly and to freedom of association with others. Any restrictions placed on the exercise of this right shall comply with the requirements of Article 11, paragraph 2 of the European Convention on Human Rights.

53. No restrictions shall be placed on the exercise of the rights to freedom of peaceful assembly and to freedom of association other than those that are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others [Emphasis in original]”.

93. Mr Jacob referred also to Articles 21 and 22 of the UN International Covenant on Civil and Political Rights, which are as follows:

“Article 21

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

(1) Everyone shall have the right to freedom of association with others, including the right to form or join trade union for the protection of his interests.

(2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right..." [Emphasis in original].

94. Having reviewed these provisions, Mr Jacob reiterated that there was no country represented in his organisation that had a ban on members of the defence forces attending a peaceful protest about pay and conditions when in civilians or off duty, as far as he was aware.

95. Counsel for the plaintiff put certain passages from the report of Professor Tonra to Mr Jacob for comment. In particular, he was asked to comment on Professor Tonra's opinion that "the parade was organised and executed as a political event and as a political protest". Mr Jacob disagreed with this characterisation: "...If I compare this with demonstrations, protests or rallies that I have seen in other countries in the past it is hardly for me [a political] event" [day 4, p.122, lines 4 to 20]. As regards what is meant by the term "political", he stated as follows:

"...We really believe that one should be very clear in making the distinction between party political and political because at the end, and honestly I don't know if there exists a definition on what is political, but at the end I think that everything is political. If at the coffee break downstairs here I tell you that I think it is high time that in the case of environment we start changing things, I think that is...a political expression" [day 4, p.122, line 25 to p.123, line 8].

96. Mr Jacob emphatically disagreed with Professor Tonra's assertion that "Irish norms and practice as set out in regulation and legislation have established their own centre of

gravity pretty much situated in a European middle ground based on its own political culture and history”. To the extent that this view applied to an order which imposed a complete ban on every member of the Defence Forces attending the event, Mr Jacob stated that Ireland’s “centre of gravity” could “surely not” be in the middle ground, as there were no other countries addressed by Mr Jacob in his report that imposed “a full ban”.

97. In cross-examination by counsel for the defence, Mr Jacob accepted that the survey in his report related only to the thirteen countries to which he referred, notwithstanding that there are 47 States in the Council of Europe, and to that extent could not say whether there were countries in the OSCE that ban military personnel protesting in civilian clothes. He pointed out however that the recommendation of 2010 had been accepted by all Ministers in the Council of Europe [day 4, p.134/5]. He also accepted that “you cannot copy systems in Europe and say this is now the perfect European system...”, as the society and history of each country is different from others.

98. Mr Jacob was asked whether he would consider demonstrations about pay and conditions to be politics. He accepted that they were, but qualified his answer as follows:

“...If I make a declaration that I think the way of driving in Ireland is not the correct way...that is politics...my idea is shouldn’t you change it, so that’s politics. But if I would at that point go closer to a political party to get that goal, then I am playing party politics. There it is very clear that you cannot do that and service...” [day 4, p.145, lines 18 to 29].

Mr Jacob stated that a protest about pay and conditions was “...about working conditions for people...about living conditions...”. He did not consider that “bringing your goals and demands to the public” was “political” as such [day 4, p.157].

99. It was put to Mr Jacob that Professor Tonra’s view was that “the absence of a uniform does not of itself eliminate the perception that that person is subscribing or agreeing with the

aims and objectives of the demonstration or political event...”. Mr Jacob replied “I think that is a huge difference. If one is there in uniform this means you are there in your quality as a military, if you are there in civilian attire you are there as a citizen of Ireland” [day 4, p.174, lines 4 to 12]. He emphatically rejected the suggestion by Professor Tonra that members attending, even in civilians, could have an effect on military discipline and morale:

“...It cannot be because one day you took freely the decision to join armed forces, wherever they are here, that at that moment you lose the fact that you are a citizen, somebody who thinks, who reflects, who wants good working conditions but also wants to do his or her job under the best conditions. We will fully accept as association, as individuals, all having made one day that choice freely that if tomorrow you are called to be deployed abroad that you cannot call for a union demonstration or a call on the street that you don’t want to go abroad. There are other ways to deal with that but that is not the point. But good working conditions, a decent salary, a decent pay is an obligation of the State. It is a shame that people should go for that. It is an obligation of the State to deliver that for those who are there for them”. [Day 4, p.175, line 22 to p.176, line 9].

Professor Ben Tonra

Preliminary objection

100. Professor Tonra, who is a political scientist and academic with extensive and impressive qualifications and credentials, and who has a particular expertise in military and international security matters, proffered an extensive report in advance of giving evidence at the hearing. Having seen the report, a substantial objection was made on behalf of the plaintiff to the report and Professor Tonra’s evidence generally. In his report, Professor Tonra, after addressing matters relating to his qualifications and experience, indicated that he had been asked by the defendants to address eleven specific questions, and these questions

were set out in the report. Counsel for the plaintiff submitted that it was “unclear how his expertise as a political scientist...qualifies him to offer an expert opinion on the eleven specific questions...” [day 7, p.12, lines 4 to 20]. It was suggested that Professor Tonra “...doesn’t appear to be staying within his own lane of competence...the onus is on the State to justify (a) that he is an expert in that area; and (b) how [his evidence is] relevant” [day 7, p.13 to 14]. There was also an objection that the State had not “laid the groundwork” to enable Professor Tonra to draw certain of his conclusions; it was suggested that Professor Tonra had relied on materials which postdated the plaintiff’s decision not to attend the event but “which critically were not before the decision-maker...” [see day 7, pp. 14 to 17].

101. The defendants accepted that Professor Tonra was not a psychologist or a lawyer, but contended that the opinion of a political scientist could not be given in a vacuum, and that Professor Tonra was entitled to give his view in this capacity taking into account surrounding circumstances. It was accepted that he would not be entitled to give a view as to what a particular legal provision meant; it should be said that at least three of the questions appeared to invite an interpretation of paragraphs of the Defence Forces Regulations.

102. The court decided that Professor Tonra’s evidence should be heard *de bene esse*, with the admissibility or relevance of his evidence ultimately a matter for the court, while permitting any specific objections by the plaintiff to be heard as the evidence progressed. Both parties accepted this *modus operandi*.

Evidence

103. Professor Tonra readily acknowledged in his report that “...military personnel are themselves citizens of the State and entitled to the enjoyment of [‘the rights and freedoms to which all are entitled’]...in the absence of conscription or obligatory national service, there is today a wide-spread recognition that, as ‘citizens in uniform’, military personnel are entitled to the same rights and freedoms as other citizens”. [Page 3 of report].

104. Professor Tonra acknowledges the United Nations International Covenant on Civil and Political Rights and the ECHR, commenting that “...OSCE Member States have reflected extensively on these principles and rulings and, along a broad spectrum, generally provide for upholding these rights for military personnel while at the same time robustly providing for the political neutrality of the armed forces...” [p.5]. Such rights would include those under Article 10 of the ECHR – providing for the right to freedom of expression – and Article 11, relating to the right of association, including that of forming and joining trade unions.

105. Professor Tonra gave evidence that, while such rights do not “stop at the gates of army barracks” – a phrase used in the European Court of Human Rights decision in *Grigoriades v Greece* (25 November 1997, cited by Professor Tonra) –, political scientists have highlighted rulings that “...it is necessary to take into account the special conditions attaching to military life and the specific ‘duties’ and ‘responsibilities’ incumbent on members of the armed forces”, a quote which he attributes to the decision of the European Court of Human Rights in *Hadjianastassiou v Greece*, 16 December 1992, para. 46.

106. Professor Tonra was asked about the WPDF generally; he described their “priority and principal objectives” as “pay and conditions”. He did not attend the event, but accepted that, having read press coverage of the event and the transcript of Captain Clonan’s evidence, “...it was a very decorous and very civilised and very appropriate parade/protest in support of improved pay and conditions for the Defence Forces...” [day 7, p. 48, lines 12 to 22].

107. Professor Tonra expressed the view that “making demands of governments to allocate resources in your own preferred direction” amounted to “making political demands on the State”. He contended that the protests were part of a series of protests which were “part of a broader political strategy which included lobbying TDs, lobbying political parties, issuing statements and having interviews in the press...to raise the issue, to garner public support for

the issue and thereby to shift government policy on the issue” [day 7, pp. 49 to 50]. In his view, the event was “a political” demonstration, and had a political aim.

108. In his evidence, Professor Tonra addressed the conclusions set out in his report. He was of the view that the attendance of members of the Defence Forces at the event “would, in my view, have amounted to subscribing to the aims and objectives of a political demonstration”, although in response to the court, he accepted that this did not necessarily involve subscribing to the organisation leading the event. While he accepted there was a “clear distinction” to be drawn between attending in uniform as opposed to in civilian dress, he stated that the absence of uniform “does not of itself eliminate the perception of such personnel subscribing to the aims and objectives of a political demonstration...” [p.22 report].

109. Professor Tonra expressed the views that the event “entailed public agitation within the meaning of para. 28 of Defence Forces Regulations S6...”; “...the demonstration had a political character within the plain meaning of para. 3 of Defence Forces Regulations A9...”; and that, as an office holder of PDFORRA, the plaintiff’s participation in the event “would have amounted to such public agitation [within the meaning of para. 28 of Defence Forces Regulation S6] on his own behalf...”: in this regard, see paras. (d), (f) and (h) on p.22 of the report. Counsel for the plaintiff renewed his objections to this evidence on the basis that they involved a legal interpretation of the regulations, for which Professor Tonra is not qualified.

110. Question (i) addressed the motivation behind the activities of WPDF and whether it was “part of a political agenda or capable of being exploited politically...”; while Professor Tonra answered this question in his report, it was accepted both by Professor Tonra and by counsel for the defendants that there was not “anything nefarious or extraneous” about the activities of WPDF: see day 7, pp. 70 to 71. The answer to question (j) contained general comment about the obligation of the State, on the one hand, to vindicate the right of citizens

to free expression, assembly and to form associations, and on the other hand, the further obligation of the State "...to ensure that the exercise of [the rights of active-duty military personnel] does not compromise the legitimacy and authority of the State in the eyes of its citizens, thereby compromising public order in a modern democratic society...".

111. In question (k), Professor Tonra was asked to address the way in which public order "could...be undermined by reason of the public perception of agitation...for better pay and conditions...". Professor Tonra gave his views in response, including the comment that "...the existing restrictions – defined in legislation, regulation and military command norms are – to my mind, reasonable and proportionate and reside within the mainstream of European practice...". As we have seen, this evidence is in conflict with the views and evidence of Mr Jacob.

112. On cross-examination, it was put to Professor Tonra that it would have been reasonable for the General Staff to consider "a restriction less invasive of the rights of peaceful assembly or less invasive of constitutional rights" or to consider "a direction that is not a blanket ban...on any member of the Defence Forces attending or, for instance, to consider a quota of members or to consider there is to be no PDFORRA banner, or you are allowed to go but you can't go as a speaker. All of those things would have been reasonable steps to at least consider?" Professor Tonra accepted that this could have been so, but that the General Staff would have had considerations other than those considered by him for the purposes of his evidence, such as military discipline or morale within the Defence Forces. He agreed however that it "might well" have been reasonable for the General Staff to consider whether they could advance their objective by less invasive means [see day 7, pp. 73 to 74].

113. Professor Tonra was pressed on the issue of what was comprised in the term "political". He accepted Mr Jacob's point that "anything can be political", but that something political "is not necessarily politicised to the extent of advocating particular legislative or

policy change on the part of the Government...management is trying to ensure that active service duty members of the Defence Forces are not engaged in issues of active political controversy..." [day 7, p.93].

114. Counsel for the plaintiff pointed out that para. 27 of Regulation S6 of the Defence Forces Regulations permitted communication by PDFORRA with "the press, radio and television and other organs of public opinion" on pay and conditions, while, pursuant to para. 27(4), "...no public statement or comment concerning a political matter shall be made by the Association". Counsel also drew to Professor Tonra's attention para. 28, which states that "...the Association shall not sponsor or resort to any form of public agitation as a means of furthering claims or for any purpose whatsoever". It was put to Professor Tonra that it followed that "public agitation" did not include advancing claims in relation to pay and conditions. Professor Tonra very fairly stated that this was "way outside my pay grade in terms of interpreting one paragraph as against another..."; his position was that there was a "legitimate line to be drawn in terms of what is political and what is not, small p/ big P I think that's a different conversation" [day 7, pp. 101 to 102].

115. Counsel referred to Captain Clonan's evidence as to the nature of the event, and put it to Professor Tonra that "if this...blanket ban is allowed to stand and servicemen and women are prevented from attending gatherings that are dignified, convivial, devoid of a security or intimidation threat wouldn't that be potentially destabilising of morale within the Force?" Once again, Professor Tonra stated that he could not address this, not having been in the Defence Forces or having the relevant experience or knowledge, but stated as follows: "...what I would say is that I think you have a very fair and legitimate point to say that if that blanket ban applies to every single thing that could be possibly be described as political it is quite a ban and therefore there has to be conversations about whether, as you said in your

opening statement, there needs to mitigation or qualification or conditions...”. [Day 7, p.108].

116. In response to a question from the court, Professor Tonra acknowledged that he was unaware of the criteria taken into account by the General Staff in issuing the Order, stating that he had not been asked to “undertake a piece of research on that question”, in which case he would have ascertained the appropriate criteria. Counsel asked whether, in hindsight, an inquiry into the criteria behind the order might have been made? Professor Tonra did not accept this “because that would be an entirely different exercise to my mind”. [Day 7, pp. 115 to 116].

117. Professor Tonra was questioned on his comment in the final paragraph of his report that “the existing restrictions – defined in legislation, regulation and military command norms are – to my mind, reasonable and proportionate and reside within the mainstream of European practice”. The court put to Professor Tonra that this latter comment, “would seem to conflict with the evidence of Mr Jacob and I am just wondering on what basis you make that statement?”

118. Professor Tonra replied that “...based on the reports from the OSCE and the Council of Europe, looking at what Irish policy is in terms of independent representative associations, in terms of how pay and conditions are negotiated and agreed with government, in terms of free association, in terms of free speech, taking all of that in the round I would say based on those reports that the Irish position is in the middle ground, but that doesn’t mean to say that I would contest the evidence of Mr Jacob, that on the specific point of a ban on attending political demonstrations that Ireland’s position isn’t at one end of that extreme. But I do make that distinction” [day 7, pp. 118 to 119].

Constitutional and legislative provisions

119. The submissions of the parties referred to a considerable number of statutory provisions and excerpts from the Constitution and the European Convention on Human Rights. Before embarking on a consideration of the issues, it is appropriate to set out such provisions as were integral to the submissions of both parties.

Constitutional provisions

120. Article 40.1 and Article 40.6.1 of Bunreacht na hÉireann are as follows: -

“40.1 All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

40.6.1 The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –

(i) The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of seditious or indecent matter is an offence which shall be punishable in accordance with law.

(ii) The right of the citizens to assemble peaceably and without arms.

Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas.

(iii) The right of the citizens to form associations and unions.

Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.”

ECHR

121. Two articles of the European Convention on Human Rights, Articles 10 and 11 – dealing with “Freedom of Expression” and “Freedom of Assembly and Association” respectively – were canvassed during submissions. Those articles are as follows: -

“10.

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

11.

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of

national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The Defence Acts 1954 [as amended]

122. Section 26 of the Defence Act 1954 as amended is as follows:

“26. (1) The Minister may make regulations, not inconsistent with this Act, in relation to all or any of the matters mentioned in the Fourth Schedule to this Act.

(2) Regulations under this section may –

(a) contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of the regulations or for giving full effect to this Act,

(b) apply either generally or by reference to a specified category or categories of persons.”

123. The fourth schedule, to which reference is made in s.26(1), contains a long list of matters in respect of which regulations may be made under the section, and includes a “catch-all” provision at para. 37:

“...Any other matter or thing which is not otherwise expressly provided for by or under this Act and which, in the opinion of the Minister, is necessary for securing the good government, efficiency and internal control and management of the Defence Forces or for carrying out and giving effect to this Act.”

124. Section 58(1) provides that “every person enlisting in the Permanent Defence Force...shall take an oath or make a declaration either in the form set out in part I of the eighth schedule to this Act or in the form set out in part II of the said schedule”. The oath at

part 2 of the eight schedule is the oath – in the English language – which enlisted men must swear and is as follows: -

“I, _____, do solemnly swear (or declare) that I will be faithful to Ireland and loyal to the Constitution and that while I am a [member] of the Defence Force I will obey all lawful orders issued to me by my superior officers and that while I am a [member] of the Permanent Defence Force I will not join or be a member of or subscribe to any political organisation or society or any secret society whatsoever and that, if I become a [member] of the Reserve Defence Force, I will not, while I am a [member] of the Reserve Defence Force, join or be a member of or subscribe to any secret society whatsoever.”

125. Section 103 of the Act is a section crucial to the justification proffered by the defendants for the Order. It is the first section in “Chapter V” of the Act, which chapter is headed “Disqualifications, Exemptions and Privileges of Members of the Defence Forces”. The margin note – to which counsel for the plaintiff referred in submissions – is “... Prohibition of membership of political and secret societies”. The section in full is as follows:

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“103. - (1) A member of the Permanent Defence Force shall not join, or be a member of, or subscribe to, any political organisation or society or any secret society whatsoever.

(2) A member of the Reserve Defence Force shall not join, or be a member of, or subscribe to, any secret society whatsoever.

(3) The Minister may by regulations –

(a) prohibit officers of the Reserve Defence Force, who are, during a period during which a proclamation authorising the calling out of reservists on permanent service is in force, or during a period during which reservists are

called out on permanent service under section 88, for the time being continuously engaged in military service or duties for which, as officers of the Reserve Defence Force they are liable, from participating in specified political activities, and

(b) prohibit reservists who stand called out on permanent service from participating in those specified political activities.”

126. Section 131 of the Act deals with the issue of sanctions for disobedience of a lawful command from a superior officer:

“131. - Every person subject to military law who disobeys a lawful command of a superior officer is guilty of an offence against military law and shall, where a charge under this section is disposed of summarily under section 177C, 178C or 179C, as the case may be, be liable to suffer any punishment awardable thereunder or, on conviction by court-martial, be liable to suffer imprisonment for a term not exceeding seven years or any less punishment awardable by a court-martial.”

127. Section 2 of the Defence (Amendment) Act 1990 deals with “representative associations, and s.2(4) of that Act provides as follows: -

“(4) A member shall not become or be a member of a trade union, or of any other body (other than an association), which seeks to influence or otherwise be concerned with the remuneration or other conditions of service of members.”

Defence Force Regulations

128. Both sides made reference to various “Defence Force Regulations” (‘**DFRs**’) relevant to the issues. DFR A9 deals with “Dress and Medals”, and para. 3, in as far as is relevant, provides as follows: -

“3. (1) Personnel shall have regard at all times for the dignity and prestige of the uniform and shall take care to avoid actions or places which might, in any way, bring the uniform into disrepute, contempt or ridicule.

(2) Personnel shall not, while in uniform, attend any meeting, demonstration or function of a political character”.

129. It is appropriate to note that the plaintiff places considerable emphasis on Regulation 3(2) above; it is submitted that the inference to be drawn from it is that, while attendance at “any meeting, demonstration or function of a political character” in uniform is clearly proscribed, attendance “in civilians” is not, and that this is consistent with the position adopted by Lieutenant Colonel White in his letter of 18 September 2008 as set out at para. 25 above.

130. Extensive reference was made by both parties to DFR S6. Regulation 19 of DFR S6 is concerned with the establishment of PDFORRA “for the purpose of representing non-commissioned officers and privates of the Permanent Defence Force...in relation to the matters specified in the third schedule to these regulations”. The third schedule deals with the “scope of representation” of PDFORRA; it is too lengthy to warrant reproduction in full in this judgment, but it is clear that it confers a wide authority on PDFORRA to concern itself with claims relating to “pay, allowances, gratuities, or grants”, and any “pension, retired pay, or gratuity for which a member may be eligible in respect of or arising out of his service...”. In addition to matters relating to remuneration, the third schedule sets out categories of “other conditions of service and career development” with which PDFORRA may concern itself. It is not disputed by the defendants in the current proceedings that PDFORRA has a wide and general remit to represent enlisted personnel in relation to matters concerning “pay and conditions” generally. It is perhaps worth noting that DFR S6 is expressed to be “made and prescribed with the consent of the Minister for Finance, in exercise of the powers in this

behalf vested in me by sections 2 and 5 of the Defence (Amendment) Act, 1990” by the Minister for Defence on 16 May 1991.

131. Regulations 27 and 28 of DFR S6 are central to the dispute between the parties and are therefore reproduced:

Communication with media, etc.

27.(1) Notwithstanding the provisions of paragraphs 27 to 33 (both inclusive) of Defence Force Regulations A.7, the Association may, subject to subparagraphs (2) and (4) hereof, communicate with the press, radio and television and other organs of public opinion. Such communication shall be through the President or General Secretary. The Association may, however, nominate another spokesperson for a particular purpose or occasion provided that his name has been notified in writing in advance to the Minister and approved by him.

(2) The permission provided for in subparagraph (1) hereof shall be subject to the condition that all comment and communications on the part of the Association or any person speaking on its behalf and all information published and circulated by it shall be strictly confined to: -

(i) the matters within the scope of representation of the Association as set out in the Third Schedule to these regulations, and

(ii) the internal affairs of the Association.

(3) Subject to subparagraph (4) hereof, the Association may circulate material among its members for their information.

(4) No public statement or comment concerning a political matter shall be made by the Association.

Public Agitation

28. The Association shall not sponsor or resort to any form of public agitation as a means of furthering claims or for any other purpose whatsoever.”

Discussion

The defendant's preliminary objections

132. As set out at paras. 12 and 13 above, the defendant raised two objections to the *locus standi* of the plaintiff to bring the proceedings. If either of these objections were to succeed, the plaintiff's proceedings would have to be struck out. It therefore makes sense to consider these pleas at the outset, before considering any other issues which may arise.

133. The first objection is made on the basis that “the Association [*i.e.*, PDFORRA], its servants or agents are prohibited pursuant to Article 28 of Defence Forces Regulations S6 from sponsoring or resorting to any form of public agitation as a means of furthering claims or for any other purpose whatsoever and as such [the plaintiff] could not partake in the protest on 19 September 2018”. In such circumstances, it is suggested that the plaintiff has no *locus standi* and that the proceedings should be struck out.

134. As we have seen, the plaintiff did not consider that his attendance at the event would have contravened Article 28. His evidence was that his attendance would have been in a personal capacity, as he would not be in uniform, would not be speaking at the event, and would not be representing PDFORRA. He considered that his attendance would have been consistent with the approach set out in Lieutenant Colonel White's 2008 letter, as he would have attended the meeting in “...his own capacity as a private citizen...”.

135. In my view, it is very clear that Article 28 of DFR S6 is directed to “the Association”, *i.e.*, PDFORRA as an institution. I accept the plaintiff's evidence that his intention was to attend the event in a personal capacity; I do not consider that contravention by PDFORRA as an organisation of Article 28 can be imputed to or inferred from the attendance by the plaintiff at the event. It is going too far to suggest that the mere fact of the plaintiff's

attendance amounted to “public agitation” by PDFORRA. There is a separate issue as to whether the attendance of the plaintiff or other members would have been in contravention of s.103 of the Act; however, I do not consider that the defendants’ objection can succeed *in limine* to deprive the plaintiff of the *locus standi* to bring the proceedings.

136. The second objection is to the effect that Commandant Sharkey’s Order was directed to 1 Armed Cavalry Squadron, and not to the plaintiff, and that the proceedings are therefore “a moot and/or theoretical and/or artificially created...”, and that the plaintiff therefore has no *locus standi*. As we have seen, Commandant Sharkey expressed the view that his order “...should have no effect on [the plaintiff] ...I have no command over him”. [See para. 64 above].

137. The plaintiff’s evidence was that he considered the order as a command which he was obliged to obey, and that he would face military sanction in the event that he attended the event: see para. 29 above. Captain Clonan’s evidence was that the Order was to be regarded as Major General’s Cotter’s Order, albeit it was expressed as an order from Commandant Sharkey. Major General Cotter gave evidence that the command structure of the Defence Forces is such that he does not have the authority to issue orders – a somewhat surprising state of affairs. However, Major General Cotter accepted in his evidence that Commandant Sharkey’s Order was an accurate representation of his direction, that he expected it to be followed by all members of the Defence Forces, and that if the plaintiff had been aware of the Order and disobeyed it, his action would have been investigated as a breach of military law: see paras. 79 to 80 above.

138. In view of the evidence, it does not seem to me that the case can be made that the plaintiff’s position was theoretical or in some way contrived. The plaintiff’s fear of falling foul of military law if he attended the event was justified; the objection to his *locus standi* in this regard is without merit.

Section 103/the Oath

139. The evidence of Major General Cotter made it clear that, having discussed the matter with the Chief of Staff and other members of the General Staff, he gave his direction at the General Staff Conference, and expected that direction to be followed. He was of the view that attendances at the event by any soldier would be inconsistent with the oath, the terms of which mirror the provisions of s.103.

140. As regards s.103(1), it is not suggested that the plaintiff or any other member of the Defence Forces proposed to join or be a member of WPDF. The main point of contention between the parties in relation to the section is whether, by attending the event, the plaintiff or other members would be deemed to “subscribe to” the WPDF, if it can be deemed to be a “political organisation or society”. It is clear that the WPDF is not a “secret society”. The words of s.103(1) mirror the requirement of the oath for enlisted personnel, and in fact for officers of the PDF and Reserve Defence Forces also: see the sixth and seventh schedules to the Act in this regard.

141. The defendants’ position is expressed succinctly at para. 6 of their written submissions:

“Given the political nature of the aims which the demonstration was seeking to promote, the plaintiff was also prohibited from attending the demonstration by virtue of s.103 of the Defence Act, 1954, as amended, (the ‘1954 Act’) which prohibits a member of the Permanent Defence Force from, *inter alia*, ‘*subscribing to*’ any political organisation”. [Emphasis in original].

142. By letter of 14 March 2022 – halfway through the hearing before me – the plaintiff’s solicitors wrote to the defendant’s solicitors to seek “clarity as to the precise legal power which your client contends forms the basis for making the order under challenge in this case...” [emphasis in original]. The letter referred to the reference by witnesses for the

defendants in cross-examination to s.103 as “a pre-existing statutory prohibition on attendance by members of the Defence Forces at events such as the one at issue in this case...”. It was suggested that this should have been expressly pleaded in the defence, together with a plea as to “the purported effect of that section on the plaintiff’s right to attend...”.

143. The defendants in a replying letter of 16 March 2022 acknowledged the reliance on s.103 “...which is reflected in the oath which enlisted persons take...”, but did not accept that their defence was in any way deficient. The defendants pointed out that a summary of the defence being put forward was set out at the start of the defendant’s submissions, which the plaintiff had had since May 2021, and that this summary addressed the points made by the plaintiff in detail.

144. In closing submissions, counsel for the plaintiff submitted that it was to be inferred from the defence, the responses to the plaintiff’s letter of 14 March 2022 and the evidence of the defendants’ witnesses that “the power [of the defendants] to make the order is s.103 and the oath full stop. That is the case we have come to meet...the State’s case, for better or for worse, is section 103 and/or the oath on the heading of vires...if we succeed on that discrete issue, in demonstrating to the court that s.103 does not bear the interpretation the State are urging, it does seem that will be decisive” [day 8, pp. 16 to 17].

The meaning of “subscribe to”

145. The court specifically asked for assistance as to “what it would be to subscribe to a political organisation or society in a sense that would be extra to joining it or being a member of it” [day 8, p.18]. Counsel referred to the margin note – “prohibition of membership of political and secret societies” – and attributed significance to it while accepting that, as a matter of statutory interpretation, the note could not be taken into account. It was suggested that the three terms – “join”, “be a member of”, and “subscribe to” must be taken together

and that “the Oireachtas intended to include all three actions within the breadth of the prohibition”. The three terms addressed the “common ingredient of membership”: a prohibition on joining alone would not capture someone who was already a member. As regards the prohibition on “subscribing to” an organisation, it was submitted that “...for ease of proof reasons it is not at all surprising that the Oireachtas also prohibited somebody subscribing to a political organisation because the payment of a subscription would be readily provable or certainly potentially provable...” [day 8, p.18, line 29 to p.19, line 23]. It was submitted that “...the once-off act of subscribing to would make out the offence even if the person has left the organisation and is no longer a member”. It was also submitted that “one could be a member without making a payment or potentially without it being possible to prove the taking out of a subscription to prove the point being taken”.

146. It was submitted that the evidence of the defendant’s witnesses suggested that the defendant’s position was that “subscribe to” should be read as “subscribe to the views and aims of” the political organisation. Counsel contended that it was not permissible to infer a meaning that required words to be inserted in the provision in order for it to bear a certain interpretation. Counsel also submitted that, if “subscribe to” were to be deemed to mean “subscribe to the views of” “...it would mean that a serving soldier is being subject to some form of thought control and cannot share the views of an organisation...”.

147. Counsel invoked the maxim “*noscitur a sociis*” [words are known by their companions]. It was submitted that “a juxtaposition of the words together shows clearly in our submission that the legislature intended to prohibit the whole idea of membership of a political organisation, being part of a political organisation. This was how the army authorities interpreted the section in Colonel White’s memo and it is undoubtedly the correct interpretation in our submission” [day 8, p.30].

148. Counsel suggested that the court’s task was “simply to decide what actually is the parliamentary intention, what has the parliament here enacted, not what might they enact elsewhere. It may be that they might make a regulation or statutory provision that creates an express prohibition on members publicly declaring their agreement with political parties and political views. That might be a desirable thing but I say it can’t be shoehorned into something that isn’t there in this section”. [Day 8, p.34, lines 10 to 19].

149. The written submissions of the defendants addressed the meaning of “subscribe to” as follows: -

“40. The definition of the word ‘subscribe’ in the Oxford Dictionary includes the following meaning:

express or feel agreement with an idea or proposal (*e.g.* ‘we prefer to subscribe to an alternative explanation’).

41. There can be little doubt that attendance at a meeting organised specifically for the purpose of promoting a particular objective in public life (for example, an amendment of the Constitution) constitutes ‘*subscribing to*’ that proposal. The Demonstration was organised for the purposes of promoting certain objectives as regards the terms of service of members of the Defence Forces. It was convened specifically for the purposes of promoting these objectives. In this way, it was (as referred to in paragraph 2 of the Plaintiff’s submissions) a straightforward ‘protest’ and attendance at it could only be interpreted as constituting support for the objectives of the protest and for the organisers of the Demonstration”.

150. In closing submissions, counsel for the defendant referred to s.58(5) of the Act which states that the oath “...shall bind such person to serve in accordance with his engagement and the tenor of such oath or declaration until he is legally discharged”. Counsel emphasised the word “tenor”, and the necessity of looking at the Act as a whole “to understand that the

prohibition against subscribing to a political organisation embraces with it this zone of political activities...” [day 8, pp. 75 to 76]. In this latter regard, counsel submitted as follows:

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“In the Minister’s submission the word subscribe is intended to capture that precise zone of political activities, if I can describe it as such, that zone of political activities which are in between private relations, private opinions and formally becoming a member for example of a political party or some other political organisation. It is a general word intended to give a general power”.

Commentary

151. While several of the witnesses offered views as to what “subscribe to” means, any such evidence is not admissible. It is for the court to interpret what is meant by the phrase in the context of the subsection and the Act as a whole.

152. It is true that the phrase “subscribe to” can be used in the sense set out at para. 40 of the defendants’ written submissions, *i.e.*, “to express or feel agreement with an idea or proposal...”. It is difficult however to see how such an interpretation could be the basis for a prohibition, the contravention of which might be an offence under military law. If a soldier expresses or feels agreement with ideas or proposals put forward by a political party, can he or she be said to be contravening s.103? It cannot be the case that the object of the section is to ensure that soldiers have no political views in their private life. In fairness, the defendants did not offer this interpretation; however, how does one define “that precise zone of political activities” which the defendants contend are captured by the phrase “subscribe to...”?

153. In my view, the point made by the plaintiff that the section prohibits subscribing to the political organisation/society/secret society itself, rather than the views of that entity, is a valid one, and is evident from the wording of s.103(1) itself. I do not think it can be the case that, in order to determine whether a soldier “subscribes to” a political organisation, one must

conduct an examination of the extent to which they agree or disagree with the aims or views of that organisation; it must be possible however to determine that they “subscribe to” that organisation.

154. The plaintiff submits that “subscribe to” means “pay a subscription to...”. While that is one possible interpretation, it is also possible that the phrase “subscribe to” was included as there may be situations in which one becomes involved with, but does not “join” or “be a member of”, something that is undoubtedly a “political organisation” or “society”.

155. For instance, there was little or no evidence before the court as to the nature of WPDF. The plaintiff said he became aware of it through social media; the court is unaware as to whether it has a formal structure, or is simply an *ad hoc* pressure group which organises for specific events, but not otherwise. It may or may not be possible to “join” WPDF; it may or may not be possible to “be a member of” WPDF. If the informality of the group is such that one cannot join or be a member of WPDF, it might nonetheless be that one can “subscribe to” the organisation by actively supporting it, becoming engaged with it, or sponsoring it in some way.

156. However, if this were correct, it would require consideration of a spectrum of involvement to determine in a given case whether a person “subscribed to” an organisation. At one end of the spectrum, a person might generally sympathise with the aims of an organisation, but take no steps to support it. A person might attend a meeting to learn more about the organisation, its aims and its members, but do no more than that. A person might agree to take part in the organisation of an event on a once-off basis; another person might commit to regular involvement; yet another person might agree to donate financially to the organisation but not otherwise actively support it. At what point along the spectrum does a member of the Defence Forces tip over into activity which involves “subscribing to” a political organisation, if indeed WPDF falls within that definition?

157. In the present case, the General Staff has decided that mere attendance by a serving member at an event organised by the WPDF falls foul of s.103 and the oath, in that such a person is deemed to “subscribe to” that organisation. In his evidence, the plaintiff did not accept that he “subscribed to” the WPDF, but accepted that his attendance at the event constituted “associating himself with” WPDF: see para. 35 (xii) and (xiii) above.

Principles of statutory interpretation

158. While both parties adduced evidence as to the meaning of the phrase “subscribe to” in s.103, and made extensive submissions as to how the phrase should be interpreted, neither side dwelt in any detail on the principles which govern the way in which the court should approach the construction of a term which can bear several different meanings or is inherently ambiguous.

159. Major General Cotter, from whom the Order originally emanated, considered that the event “would be a political event...we would have a concern that members of the Defence Forces would attend. It would be contrary to their oath. It would be contrary to loyalty to the Constitution...” [see para. 71 above]. As the wording of the oath mirrors that of s.103(1), and as that section directly concerns the relationship between members of the Defence Forces and “any political organisation or society or any secret society whatsoever”, it is necessary for the court to come to a conclusion as to what is meant by the phrase “subscribe to”.

160. The general principles relating to statutory interpretation were thoroughly reviewed by the Supreme Court in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43: see the judgment of Murray J at paragraphs 105 to 128 in particular. While I gratefully adopt the entire of the analysis by Murray J in those paragraphs, there are certain aspects of it which have particular relevance to the present dispute.

161. At para. 106 of his judgment, Murray J refers to a number of the “most significant decisions” on statutory interpretation, and summarises with approval the “essential points” made by McKechnie J in *Brown; Minister for Justice v Vilkas* [2020] 1 IR 676 as follows:

“(i) The first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning (at paras. 92 and 93).

(ii) However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include ‘*the immediate context of the sentence within which the words are used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including...LRC or other reports; and perhaps...the mischief which the Act sought to remedy*’ (at para. 94).

(iii) In construing those words in that context, the court will be guided by the various canons, maxims, principles and rules of interpretation all of which will assist in elucidating the meaning to be attributed to the language (see para. 92).

(iv) If that exercise in interpreting the words (and this includes interpreting them in the light of that context) yields ambiguity, then the court will seek to discern the intended object of the Act and the reasons the statute was enacted (at para. 95) [Italics in original].

162. At para. 107, Murray J stated as follows:

“On the specific issues in that case McKechnie J dissented, but the basic proposition has been restated since: in his judgment (with which O’Donnell, MacMenamin, O’Malley and Finlay Geoghegan JJ agreed) in *Dunnes Stores* (at paras. 64 to 66) – ‘*context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that*’: (and in

Bookfinders at para. 53 per O'Donnell J approving paras. 62 to 72 of the judgment in *Dunnes Stores* and with whom Clarke J, MacMenamin, Charleton and O'Malley JJ agreed): '*[a] literal approach should not descend into an obdurate resistance to the statutory object, disguised as adherence to grammatical precision*' (at para. 56).

Ambiguity will thus arise because on its face the text is clearly susceptible to more than one meaning, but it may also be contextual, so that seemingly clear words can, when placed in situation, bear a construction not always evident from the language alone: as McKechnie J stated in his judgment in *Vilkas* (see paras. 85 to 87) (and with which Clarke CJ, O'Donnell, MacMenamin and O'Malley JJ agreed)

('[c]onsideration of the context forms a part of the literal approach ')" [Italics in original].

163. Murray J commented at para. 108 that "...while McKechnie J envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose – it is now clear that these approaches are properly viewed as part of a single continuum rather than as separate fields to be filled in, the second only arising for consideration if the first is inconclusive". He went on at para. 115 to observe that:

...The words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it."

164. The words of the statute “must be viewed in context”; and as Murray J observed at para. 116 of *Heather Hill*, “...the ‘context’ that is deployed to that end and ‘purpose’ so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language”.

165. At para. 124 of his judgment, Murray J refers to Woulfe J in *The People (DPP) v. AC* [2021] IESC 71, quoting with approval “the view that ‘ambiguity’ for the purpose of the provision could arise where there was doubt as to the scope of the intended application of the provision (at para. 49).”

Analysis

166. It seems to me that the phrase “subscribe to” is an ambiguous term, and the scope and range of what was intended by the term is unclear. In such circumstances, I am urged by the plaintiff that I should employ the maxim “*noscitur a sociis*” in order to elucidate the meaning of the term. It is suggested that the term “subscribe to” must be interpreted in the context of the preceding words “join” or “be a member of”; effectively, that it is the third in a series of words with a connected meaning, and must be interpreted in conjunction with those terms.

167. Section 103(1) states that a member of the Defence Forces “shall not join, or be a member of, or subscribe to, any political organisation...”. The words “join” and “be a member of” are absolutely clear and unambiguous. Those words connote a “joining cause” with the organisation in question, in which a person formally aligns him or herself with such an organisation, forming part of it. Both “join” and “be a member of” signify a personal commitment which extends beyond mere attendance at an event or interest in the aims or views of the organisation in question.

168. As we have seen, the term “subscribe to” has a range of meanings, and various activities along a spectrum might or might not constitute “subscribing to” an organisation,

depending on the context. In the present case, the order prohibits unequivocally mere attendance, in or out of uniform, at events such as that on September 19, 2018. Such attendance is expressed as being "...NOT compatible with military service". This view is not explained or elaborated upon in the order; the evidence of Major General Cotter however is that attendance at an event such as the one on 19 September 2018 amounts to subscribing to what is a political organisation, and infringes s.103(1) and the oath.

169. It was very clear from the evidence of Major General Cotter that mere attendance by a member of the Defence Forces was prohibited by the Order, as he regarded such attendance as a "demonstration in public" in relation to "a political issue in the political arena": see para. 82 above. However, the issue arising from s.103(1) which underpins both the oath and the Order issued by Commandant Sharkey is whether the attendance prohibited by the Order amounted to "subscribing to" a "political organisation".

170. In this latter regard, it does seem to me that, whatever its nature or constitution, WPDF can be regarded as a "political organisation". While Captain Clonan, who attended the event, expressed the view that it was not an attempt to change government policy, and that there was a distinction between changing government practice – which he said was the objective of the event – and changing government policy, WPDF sought to influence politicians with a view to having them bring about change for the better with regard to pay and conditions for the Defence Forces. However informal the group was, or however respectfully and peacefully it conducted the event, this is the *raison d'être* of the WPDF, and the fact that speeches were made outside Leinster House, with letters handed in personally to public representatives, makes it clear that WPDF is a political organisation.

171. However, I do consider that "subscribe to" must be interpreted in the context in which it appears in s.103(1), and in particular the fact that it is third in a series of expressions, the first two of which signify a tangible commitment to the "political organisation" in question.

The wording of the subsection, with commas after each of these phrases "...join, or be a member of, or subscribe to, any political organisation..." in my view strengthens the interpretation that they are *sui generis* and are intended to be taken together to signify different types of this commitment. The subsection in my view prohibits active involvement in the organisation; in this context, "subscribe to" could refer to the payment of a subscription or a financial donation; or active involvement in the organisation, such as handing out leaflets or canvassing support or, indeed, taking part in the organisation of a parade or other event. All of these things could be done without "joining" or "being a member of" the organisation, and I can see how it might be inferred that such activities might be viewed as "subscribing to" the organisation in the sense of actively and openly giving support to the organisation. Such actions could in my view be of a piece with "join" and "be a member of" and one could well see how such proactive steps could be viewed as infringing s.103(1) as constituting an unacceptable entry into the political arena.

172. What is prohibited by the Order in the present case is attendance at "unofficial parades and protests on behalf of members of the DF in the coming weeks". Given the context in which the prohibition in s.103(1) on subscribing to a political organisation occurs, I do not think that attendance alone, without more, can constitute subscribing to the WPDF. Soldiers who would attend an event such as that on September 19, 2018 in civilian clothing, not speaking at the event or taking part in its organisation in any way, but who simply would have turned up, listened to what was said and chatted to some former comrades, could not in my view be deemed to be "subscribing to" the WPDF; nor do I think that the fact that any soldier who would have attended the event would have sympathised with the aims and objectives of the WPDF means that such a soldier was "subscribing to" the WPDF. Indeed, it seems to me that the attendance of soldiers in civilian clothing, in circumstances where they pointedly took no part in the activities or organisation of the parade other than listening and

observing, would seem to me to be indicative of a conscious decision not to “subscribe to” the entity which organised the event.

173. Much was made by the plaintiff of the attitude of the Defence Forces to involvement by members in protests such as that referred to in Lieutenant Colonel White’s letter of 2008, the protests regarding barracks closures in 2012, and the ICTU Day of Action in 2013. It is difficult to know how helpful these examples are as context for the interpretation of the Order or s.103(1); they all post-date the enactment of the section, and Major General Cotter was in any event of the view that attendance at protests against the barracks closures was “not appropriate”: see para. 81 above.

Context: other statutory provisions

174. As we have seen, Article 3(2) of DFR A9 provides that “...personnel shall not, while in uniform, attend any meeting, demonstration or function of a political character”. The plaintiff placed considerable emphasis on this, suggesting that it implicitly authorised attendance at such a function “in civilians”. I do not think this provision can be deemed to extend that far. Article 3 concerns “Uniform-Limitations on Wear”, and Article 3(1) provides that “...personnel shall have regard at all times for the dignity and prestige of the uniform and shall take care to avoid actions or places which might, in any way, bring the uniform into disrepute, contempt or ridicule”. Article 3(2) in my view was intended simply to underline that the military should not be associated with a “meeting, demonstration or function of a political character” arising from attendance by personnel in uniform, but was not intended to be a “green light” to participation in such an event in civilian clothing. The sub-article is however unhappily worded, and may have reinforced a view among personnel that attendance at political events was permissible as long as the uniform was not worn.

175. The defendants laid emphasis on the plaintiff’s status as Deputy General Secretary of PDFORRA. It was suggested that his presence alone at the event would have been construed

as attendance in his official capacity, or as signifying the support of PDFORRA for the event. The defendants relied on Article 28 of DFR S6, quoted at para. 131 above, in this regard.

176. PDFORRA is entitled to express views on a range of matters, including pay and conditions of members of the Defence Forces, and to express them in accordance with Article 27 of DFR S6, *i.e.*, through the President or General Secretary or a nominated spokesperson approved by the Minister. PDFORRA cannot make a public statement or comment concerning a political matter, although it may be difficult to reconcile Article 27(4) in this regard with statements by PDFORRA critical of the Government regarding pay and conditions.

177. In any event, it seems to me that, if the plaintiff had attended the event in civilian clothing and not involved himself with speaking or the organisation or promotion of the event, it is more likely that this would be interpreted as a scrupulous observance of the parameters of PDFORRA's role, rather than some form of "public agitation" by PDFORRA itself as prohibited by Article 28. I do not accept that the mere attendance, without more, of the Deputy General Secretary of PDFORRA at the event would have contravened Article 28; indeed, it could perhaps be said that the plaintiff would not have been doing his duty if he neglected to attend and apprise himself of matters so closely linked to the interests of his own organisation.

Principle against doubtful penalisation

178. If a member of the Defence Forces were to act in contravention of s.103(1), such an act would also be in contravention of his oath, as we have seen. As such, a member would be guilty of an offence under military law and liable to conviction by court-martial. Both the plaintiff and Corporal Guinan expressed dismay at the possibility that attendance at the event, which they had assumed to be permissible until made aware of the Order, would have rendered them in breach of military law.

179. In his oral submissions to the court, counsel for the plaintiff invoked the “principle against doubtful penalisation”. Counsel submitted that “...because we are dealing with potential military offences there must be clarity. Servicemen must know when they are taking the oath where they are getting into. Servicemen must know what section 103 actually covers...” [day 8, p.35, lines 20 to 24].

180. The principle was discussed in *Bookfinders Limited v the Revenue Commissioners* in both the Court of Appeal ([2019] IECA 100) and the Supreme Court ([2020] IESC 60). At para. 74 of the judgment of the Court of Appeal (Kennedy J), the court stated as follows: -

“74. Statutes which concern an individual’s liberty or property have been construed strictly by the courts so that a person should not be penalised as a result of a provision which is unclear. In the context of a criminal statute that imposes a penal sanction, the words in the statute must be plain and unambiguous in order that the conduct in issue is identified as an offence. However, it is important to note that the principle against doubtful penalisation applies only insofar as the provision in an enactment is ambiguous and such ambiguity remains after other canons of interpretation have failed to resolve it”.

181. In the same case, the Supreme Court considered the principle. O’Donnell CJ stated as follows: -

“[52] “...It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible. The rule of strict construction is best described as a rule against doubtful penalisation. If, after the application of the general principles of statutory interpretation, it is not possible to say clearly that the

Act applies to a particular situation, and if a narrower interpretation is possible, then effect must be given to that interpretation. As was observed in *Kiernan*, the words should then be construed ‘strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language’”.

182. O’Donnell CJ went on to quote from the judgment of McKechnie in *The People (DPP) v TN* [2020] IESC 26, in which McKechnie J reviewed the principles of interpretation, and concluded *inter alia* as follows: -

“...The principle does not mean that whenever two potentially plausible readings of a statute are available, the court must automatically adopt the interpretation which favours the accused: it does not mean that where the defendant can point to any conceivable uncertainty or doubt regarding the meaning of the section, he is entitled to a construction which benefits him. Rather, it means that where ambiguity should remain following the utilisation of the other approaches and principles of interpretation at the Court's disposal, the accused will then be entitled to the benefit of that ambiguity. The task for the Court, however, remains the ascertainment of the intention of the legislature through, in the first instance, the application of the literal approach to statutory interpretation”.

183. It is not disputed by the parties that a breach of s.103 would result in a penal sanction. Section 168(3) of the Defence Acts provides as follows: -

- a. “the contravention (by act or omission) by any person – ...
 - i. Any of the provisions of this Act [including section 103]... is an act, conduct, disorder or neglect to the prejudice of good order and discipline”.

184. I have concluded that s.103 includes an offence of “subscribing to...a political organisation...”, and that the prohibited activity – attendance at “such events” – could not, without more, constitute “subscribing to” the WPDF contrary to s.103. That finding is

sufficient to dispose of the contention that, if the plaintiff had attended the event in civilian clothing and took no part in it, he would have justifiably been subject to military discipline as having contravened s.103(1). However, there is no doubt that the phrase “subscribe to” is ambiguous, as varying incidences of conduct may or may not fall within the ambit of that term.

185. It seems to me that, had Sergeant Bright not become aware of Commandant Sharkey’s order and had attended the event in the manner in which he intended, and subsequently was subject to military discipline as a result, he might well have been entitled to invoke the principle in his defence on the basis that it was not possible to know in advance what level of activity was comprised in the term “subscribed to” so that he could conduct himself in accordance with the section.

The Order is *ultra vires*/infringes on constitutional rights?

186. The pleas of the plaintiff in relation to the alleged *ultra vires* nature of the Order are set out at para. 7 above. Primarily, it is argued that no express power in the Defence Acts permits an officer of the Defence Forces to order a member of the Defence Forces to refrain from attendance at a civilian event, while off duty and not in uniform; it is also contended that the defendants cannot “make any order, command or instruction...which would unduly, unreasonably or disproportionately infringe upon the plaintiff’s constitutional rights...”. It is submitted that any such order would be *ultra vires*.

187. While the defendants raised numerous matters by way of defence, it appears that – as pointed out by counsel for the plaintiff: see para. 144 above – the statutory basis for the order on which they relied as providing justification for it was s.103 of the Defence Acts, and the oath sworn by enlisted men as set out at s.58(1) and part II of the eighth schedule: see para. 124 above. It was clear from the evidence of Major General Cotter that the Order reflected his belief that attendance at the WPDF events was “...NOT compatible with military

service...”, and that he considered such attendance to be incompatible with the obligations imposed on members of the Defence Forces by s.103 and the oath which they had sworn.

188. For the reasons set out above, it does not appear to me that s.103 or the oath provide a basis or a justification for the making of the Order. No other statutory provision is advanced by the defendants as expressly underpinning the legality of the Order. As we have seen – at para. 123 above – regulations may be made in respect of any matter not expressly provided for in the Act “...which, in the opinion of the Minister, is necessary for securing the good government, efficiency and internal control and management of the Defence Forces...”. It therefore is open to the Minister to enact regulations which would make clear the circumstances in which members of the Defence Forces could or could not attend public events. However, no such regulations have been enacted.

189. The plaintiff argues that the Order constitutes a change in the policy which he contends was set out in DFR A9: see para. 128 above. It is contended that the policy can only be changed by amending regulation, which in turn can only be done by the Minister. This argument depends on the assertion that para. 3(2) of DFR A9, which states that “personnel shall not, while in uniform, attend any meeting, demonstration or function of a political character”, implicitly permitted attendance at such events when not in uniform. For the reasons set out at para. 174 above, I do not believe that DFR A9 bears this interpretation. If the Order represents a reversal of policy, it is the policy which the plaintiff considers was established by the letter of Lieutenant Colonel White of 18 September 2008, and the 2013 circular in relation to the “ICTU Day of Action”. Whether these matters comprised a considered policy must be doubted; they seem to have been *ad hoc* positions in relation to specific situations.

190. It does not seem to me that the Order reversed a specific policy which permitted members of the Defence Forces to attend functions of a political character when not in

uniform. There was no specific legislative provision, whether by act or regulation, which addressed the issue. I do not think therefore that the Order could be deemed *ultra vires* as contradicting a policy expressed in the regulations. On the other hand, there was no legislative authority subtending the Order; given that it clearly abrogated to some degree the rights of members, the lack of direction and regulation in this area was and is unfortunate, particularly as there is wholesale confusion in relation to what is permissible as regards attending events which may be classed as “political”, and what is not.

191. The plaintiff contends that the Order infringes impermissibly on the fundamental rights of the plaintiff and other members of the Defence Forces, in that infringements of constitutional rights, where permissible, must not be more than what was necessary or essential for the protection of the interest or objectives which grounded the justification for the interference in the first place. In this regard, the plaintiff relies heavily on the decision of McKechnie J in *Holland v Governor of Portlaoise Prison* [2004] 2 IR 573.

192. The court does not have any documentation in relation to why the view was taken that the Order was necessary. It is clear from the evidence of Major General Cotter that it emanated originally from the discussion by the General Staff, and the subsequent direction given at the General Staff Conference at 8.30am on 23 August 2018: see paras. 72 to 77 above. Major General Cotter was very clear however in his evidence as to the reason for the Order; he was concerned that the event on 19 September 2018 was a “political event”, attendance at which would cause members to be in breach of their oath, and acting against the Constitution. Attendance, whether in or out of uniform, would be “not compatible with military service...”.

193. It was not entirely clear from the evidence whether Major General Cotter was of the view that attendance of members at the event should be prohibited because, in the view of the General Staff, such attendance would contravene s.103 and the oath, or whether there was

some wider consideration of the perceived effect on morale and discipline; the answer given to the court's question on day 6 – set out at para. 75 above – would suggest that the concern was that morale would be affected due to "...members of the Defence Forces...going against their oath, against the Constitution...that was our concern in the morale area".

194. The plaintiff acknowledges that the Defence Acts and regulations "...contain a number of measures which restrict the exercise of free expression, assembly and association by members of the Defence Forces, as well as protections designed to ensure the continued loyalty and obedience of members to the Defence Forces" [written submissions para. 12]. These restrictions involve rights guaranteed under the Constitution and the ECHR. The measures have "either been enacted by the Oireachtas, or promulgated by the Minister pursuant to the power expressly granted to him to do so pursuant to the Defence Acts" [written submissions para. 15]. The provisions relevant to the present dispute are set out at paras. 122 to 131 above.

195. The defendants have attempted to argue that what is an undoubted restriction by means of the Order on the rights of members is justified by the terms of s.103 and the oath. As we have seen, I am of the view that this reliance on s.103 and the oath as a basis for the Order is misguided. The defendants do not offer any other statutory provision as justification for the Order.

196. The plaintiff argues that "...[i]n purporting to place further restrictions upon the exercise by members of the Defence Forces, including the plaintiff, in the manner in which they have, *i.e.*, by way of the promulgation of the Order, the servants or agents of the defendants, whether DCOS (Sp), or the CO, have purported to exercise a power vested by the Oireachtas in the Minister under the Defence Acts..." [written submissions para. 15]. The Plaintiff further contends that the Oireachtas "...intended that the Defendants, their servants or agents, would exercise their powers under the Defence Acts in a manner which would

vindicate the Plaintiff's constitutional rights. The Order promulgated by the servants or agents of the defendants constitutes an unjustified and disproportionate interference with the Plaintiff's constitutional rights under Article 40.6.1" [written submissions para. 15].

197. In short, the plaintiff argues that, if s.103 did permit the issuance of the Order, or it were generally permissible for an order restricting the rights of members of the Defence Forces to issue without the support of statutory authority, the Order in the present case went too far in that its interference with the rights of members was disproportionate:

“28. The Order promulgated by the defendants in this case is clearly disproportionate to whatever goal it seeks to achieve. Members of the Defence Forces, including the plaintiffs, were already subject to numerous limitations on the exercise of their rights to free expression, assembly and association; the imposition of a blanket ban on their attendance at a peaceful protest, while in civilian attire and unarmed, is an unnecessary interference with those fundamental constitutional rights. It cannot have been the intention of the Oireachtas, in empowering the Minister under the Defence Acts to delegate authority to officers of the Defence Forces to give lawful commands, to allow such a disproportionate interference with the constitutional rights of members of the Defence Forces” [para. 28 written submissions].

198. The basis for this position is the decision of McKechnie J in *Holland*. In that case, the applicant challenged a determination made by the respondent prison governor that the applicant prisoner should not be permitted to communicate with members of the media in specific circumstances. The grounds relied upon by the applicant were as follows: -

“(A) that the refusal to grant access by prison visits to journalists and members of the media was based on general and non-specific policy considerations and not on an individual determination of the applicant's situation;

(B) that the Prison Rules 1947, which have not been amended or revised, are in breach of the applicant's constitutional rights under Article 40.6.1(1) (the right of citizens to express freely their convictions and opinions);

(C) that the decision by the respondent amounts to a fetter on the applicant's right of access to the courts for the purpose of proving that there has been a miscarriage of justice in relation to his conviction and sentence for the possession of drugs;

(D) that the application of the Prison Rules 1947 by the respondent is in breach of the applicant's constitutional rights as provided for in Article 40.3.2 (the State shall...in the case of injustice done, vindicate the life, person, good name and property rights of every citizen);

(E) that the refusal of the applicant's request by the respondent was unreasonable and disproportionate so as to be *ultra vires* and in breach of the rules of natural and/or constitutional justice." [Paragraph 6 of judgment, pp. 578-579].

199. The respondent opposed the application on the basis that "the refusal decisions were made pursuant to rr. 59 and 63 of the Prison Rules, that the denial of access to the media was reasonable and was a consequence of [the applicant's] lawful imprisonment and that the interference with his correspondence, by reading and if necessary by total or partial censorship, was also justified. The reasons why the respondent decided as he did under the aforesaid rules were on the grounds of security and good order within the prison". [Paragraph 7, p.579].

200. McKechnie J granted the reliefs sought, holding that the prison rules "...must, if such an interpretation is reasonably open, be construed and applied in such a manner as respects and vindicates the constitutional rights of the applicant and which upholds the principles of natural justice...if the impugned decisions in this case were not made under the Prison Rules

but otherwise on a lawful basis, they would equally have to respect the rights and principles last mentioned.” [Paragraph 16. p.586].

201. McKechnie J emphasised the need for proportionality in the imposition of any such restriction in accordance with the principles in *Heaney v Ireland* [1994] 3 IR 593:

“Given that the right in issue in this case is constitutionally based, it can I think be taken that any permissible abolition, even for a limited period, or any interference, restriction or modification on that right should be strictly construed with the onus of proof being on he who asserts any such curtailment. In addition, the limitation should be no more than what is necessary or essential and must be proportionate to the lawful objective which it is designed to achieve. That a test of proportionality, where relevant, is now applied when considering constitutional rights is beyond doubt. In *Heaney v Ireland* [1994] 3 IR 593 at p.607 Costello J. described this principle as follows: -

‘In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (...) and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society.... The means chosen must pass a proportionality test. They must: -

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible, and

(c) be such that their effects on rights are proportional to the objective.”

[Paragraph 32, pp. 594-595].

202. Counsel for the plaintiff, in his oral submissions, submitted that this passage was authority for the proposition that the onus of proof was on the party imposing the restriction to justify it. Counsel for the defendants, in his replying submissions, emphatically rejected this proposition, citing the decisions of the Supreme Court in *Fleming v Ireland* [2013] 2 IR 417 and *Donnelly v The Minister for Social Protection* [2022] 2 ILRM 185 in this regard.

203. It seems to me that the defendant is correct in contending that the onus of proof is on the plaintiff, whose submission that the onus is on the defendant seems to me to be based on a misreading of the foregoing passage from *Holland*. In referring to the onus of proof “being on he who asserts any such curtailment...”, the court was referring to the assertion by the plaintiff of a curtailment of his rights. There is no suggestion in the judgment of McKechnie J that he considered the onus to shift to the party imposing the restriction.

204. It should also be noted that McKechnie J affirmed in *Holland* that the proportionality principle “equally applies to executive decisions which affect personal rights...it is quite appropriate to consider in this case whether the aforesaid policy of the Prison Service and the operation of rr. 59 and 63, as these have been applied to the applicant, are proportionate to the objectives of the respondent, namely the maintenance of security and good order”. [Paragraph 32, p.595].

205. If therefore the Order was of a type which Commandant Sharkey was entitled to make – in the sense of not being required to derive from legislation or regulation – or if in fact s.103 provided an appropriate statutory basis upon which the Order could be issued, it still

required to satisfy the proportionality test, if it were the case that it restricted rights, as the plaintiff alleges, under Article 40 of the Constitution and Articles 10 and 11 of the ECHR. In this regard, the defendants did not suggest that the Order did not, at a minimum, restrict the rights of members of the Defence Forces to assemble peaceably and without arms; the defendants essentially argue that the restrictions on such rights imposed by the Order were justified for the reasons given by Major General Cotter in evidence. It is also specifically pleaded in the defence – see para. 16 above – that the Order did not “unreasonably or disproportionately” infringe upon the plaintiff’s constitutional or ECHR rights.

Evidential findings

206. I am satisfied that the evidence adduced by the plaintiff establishes the following matters:

- on becoming aware of the event, the plaintiff decided to attend it;
- on the basis of what he considered to be the existing practice governing attendance at public events, he took the view that he was entitled to attend the event, as long as he did not do so in an official capacity on behalf of PDFORRA;
- he considered that members of the Defence Forces could attend “in civilians” as long as they did so “as private individuals”;
- he was aware of the necessity to comply with s.103, but did not consider that attendance as a private citizen, not in uniform and not bearing arms, infringed s.103;
- on becoming aware of the Order, he considered that members of the Defence Forces, including himself, could not attend the event, and that any such attendance would be a breach of military law;

- the Order was directed primarily to upcoming WPDF events, but intended to govern attendance at “such events”;
- breach of the Order by members was intended to have serious consequences for such members, including disciplinary action under military law;
- the event itself was a “political event”, but the evidence of Captain Clonan established that it was a well-organised, orderly and dignified affair, with no element of agitation or unruliness;
- the plaintiff considered the Order to constitute a reversal of policy established in 2008, and observed on a number of subsequent occasions, whereby public demonstrations could be attended by members in their own capacity as private citizens “provided such activity is not captured by s.103(1) of the Defence Acts” [letter from Lieutenant Colonel White 18 July 2008].

207. As regards Mr Jacob’s evidence, he accepted that he could not comment about the situation in Ireland, or whether an event such as that held by the WPDF was permissible according to Irish law. His evidence was primarily directed towards the situation in Euromil countries of which he was aware in relation to protests regarding pay and conditions. His evidence was that, in those countries, such demonstrations were permitted, although he readily conceded that he was not aware of the situation in this regard in all forty-seven states in the Council of Europe. He accepted that such events were “political”, but drew a distinction between “party political” events and events concerning pay and conditions. He considered that the latter were broadly acceptable and permissible in Euromil countries, and that they were consistent with measures such as Articles 10 and 11 of the ECHR, recommendation CM/REC (2010) – see para. 92 above – and Articles 21 and 22 of the UN International Covenant on Civil and Political Rights (para. 93 above).

208. Professor Tonra’s evidence was more problematic, and as we have seen, strong exception was taken to it by the plaintiff. Much of it was addressed towards whether the event could be regarded as a “political” demonstration; his view was that it was political, and had a political aim. He expressed the view that the attendance of members of the Defence Forces at the event would have amounted to subscribing to the aims and objectives of the event, although he accepted that this did not necessarily involve subscribing to the organisation leading the event. Professor Tonra very properly made concessions where appropriate to do so, and declined to offer a view where it was clear that the question involved a legal issue: see paras. 103 to 118 above. While Professor Tonra is an expert in the field of political science, much of his evidence consisted of expressing views in relation to the situation at hand; there was certainly an issue as to whether this involved the application of expertise for the benefit of the court, or merely involved speculation and the expression of personal views. In truth, the evidence of Professor Tonra was, in the particular circumstances of this case, not of much assistance to the court.

Proportionality/vires: analysis and conclusions

209. The *Heaney* analysis in relation to whether the Order was proportionate must be conducted in the light of the foregoing evidence. The evidence adduced by the plaintiff to satisfy its burden of proof must be balanced against that of the defendant witnesses, and Major General Cotter in particular.

210. The ban on attendance at the event must firstly be “rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations”. The objective appears to have been to prevent members from becoming embroiled in the political arena, which in the view of Major General Cotter, would have been contrary to the oath and the Constitution. However, there is no such broad-based prohibition in the Act or the Defence

Force rules prohibiting members from engaging in political activity, save that s.103 prohibits joining, being a member of, or subscribing to, a political organisation.

211. Furthermore, my strong impression of Major General Cotter's evidence was that the motivation behind the Order was to maintain a strict prohibition on any involvement in events that could be deemed "political". It does not seem to me that the precise terms of s.103 were in the minds of the general staff when the direction regarding the order was given, notwithstanding that it has been put forward as the justification or statutory basis for the Order. As we have seen, s.103(1), properly construed, does not contain a general prohibition on political activity as such. The General Staff may be entirely correct as to the desirability of keeping a strict separation between military matters and involvement in political affairs; however, there is no statutory basis for compelling members to observe this separation, other than the limited imperative set out in s.103.

212. That there is no statutory basis for curtailing the rights of members to become involved in political activity is surprising; as we have seen, the fourth schedule to the Act allows the Minister to make regulations in relation to any "matter or thing...necessary for securing the good government, efficiency and internal control and management of the Defence Forces for carrying out and giving effect to this Act". If the Minister were to avail of her power to make regulations, clarity could be brought to this difficult area, and members of the Defence Forces would know exactly where they stood in a given situation. This area was explored by counsel in cross-examination of Professor Tonra: see para. 112 above.

213. The prohibition on attendance was a complete ban; it made no attempt to differentiate between the various levels of involvement in the event which were possible, from mere attendance on the one hand, to involvement in the organisation of the event on the other. No indication of why mere attendance in civilian clothing was unacceptable was given. There is no indication of consideration being given by the general staff to the effect on members who

would have wished to attend the event, even if not participating in it. No explanation was forthcoming, either at the time or during the hearing, as to why there was what PDFORRA regarded as an apparent *volte-face* in policy terms, whereby members had previously been allowed to attend protest meetings in the past, but now apparently were not. The prohibition was complete and open-ended; it was clear that it related to all “such events” in the future.

214. In my view, the Order was a “blunt instrument” which went much farther than necessary. There is no indication that the nature of the WPDF events was considered. There were no indications in advance of the events that they would be conducted other than in an orderly, respectful and non-confrontational manner, and the evidence of Captain Clonan in relation to the Dublin event makes it clear that this is what transpired; the “Respect and Loyalty” of the Facebook page was reflected in the event itself. Any prohibition which involves the curtailment of rights of members to freedom of assembly would have to have involved a careful consideration of the type of event at which attendance was banned. There is no indication that attendance by members in a regulated manner was considered, with perhaps provision for nominated members representative of the various ranks to attend, so that any difficulties potentially arising from large numbers of members attending would be obviated. Nothing short of a total and complete ban on attendance, whether in civilian clothing or otherwise, appears to have been considered.

215. It is not apparent to me why attendance at these events without more would have been contrary to the oath, which mirrors the wording of s.103(1). While the evidence of Mr Jacob is not directly relevant to the issues at hand, it does provide some comfort that a broad selection of Council of Europe countries permits attendance at events concerning pay and conditions by members of the military in civilian clothing. It is difficult to see how passive attendance “in civilians” by members at a well-organised and non-confrontational event

concerning matters so fundamental to their wellbeing could be in conflict with the oath taken by all members.

216. It follows that I do not consider the somewhat nebulous and ill-defined purpose of the Order, insofar as it can be ascertained at all, to warrant a wholesale, blanket curtailment of the rights protected by Article 40 of the Constitution. All of the parties accept that the rights of members of the Defence Forces do not “stop at the gates of the army barracks...”. Equally, the parties accept that the particular nature of military service will on occasion warrant the restriction of rights which other citizens may have.

217. Members in this country join the Defence Forces voluntarily; it is all the more important that it is clear to entrants what rights will be circumscribed when they join, and that the restrictions on fundamental rights are no more than necessary. The Act provides the mechanism for appropriate regulations to be made to provide such clarity; unfortunately, no such regulations have been formulated to regulate involvement of members in political affairs.

218. The Order purports to give effect to s.103(1), but does not do so. No justification of the Order is apparent to me that would render it other than arbitrary, unfair and based on irrational considerations. It gives no consideration to the objective being achieved in a minimally intrusive manner. There is no statutory basis or justification for the Order. It is an excessive interference with the constitutional rights of members of the Defence Forces.

219. Accordingly, I consider that the Order fails the proportionality test in *Heaney*, is *ultra vires* the defendants, and constitutes a violation at a minimum of the rights guaranteed by Article 40.6.1 of the Constitution of Ireland to assemble peaceably and without arms.

220. I should say in this latter regard that the defendants accept that the right to assemble peaceably and without arms guaranteed in Article 40.6.1(ii) is engaged in the present case, although they argue that the interference with that right by the Order is justified and not

disproportionate. They argue however that “it is not at all apparent that the other rights in Article 40.6.1 (the right to express freely convictions and opinions and the right to form associations) are engaged herein” [para. 80 written submissions].

221. The Order, to the extent that it prohibited attendance at the event, certainly infringed against the right of members to “express freely their convictions and opinions” at the meeting. The difficulty, as we have seen, lies in determining whether a member who chose to speak at the meeting or carry a placard or otherwise express her views would, in doing so, be “subscribing to” the WPDF. In the plaintiff’s case, his evidence was that he did not intend to do other than attend the meeting; the Order did not therefore meaningfully impact upon his right to freedom of expression as regards the WPDF event.

222. The plaintiff does not assert that his right “to form associations or unions” is fettered by the Order. However, the plaintiff submits as follows: -

“48. The Plaintiff does not wish to form an association or union. It is a corollary of the rights directly protected under Article 40.6.1, and enunciated by the Supreme Court in [*NUR v Sullivan* [1947] IR 77], that a total prohibition on contact with a specified group engaged in a peaceful protest (in this case the Wives and Partners of the Defence Forces) is in effect the proscription by the State of participation in peaceful protest alongside members of a particular association. Such a blanket prohibition is impermissible. If, as was confirmed in *Sullivan*, the State cannot prescribe the associations or unions a citizen is entitled to join, then the corollary of this limitation on the State’s power is that the State cannot prescribe which associations the Plaintiff is entitled to associate with (although the Plaintiff accepts he cannot join any such association or group, due to the prohibition set out at s.2(4) of the 1990 Act), unless such prescription is required by the dictates of public order and morality. No such exigencies arise in this case.”

223. The plaintiff thus submits that he is entitled to “associate with”, but not “become or be a member of a trade union, or of any other body (other than an association), which seeks to influence or otherwise be concerned with the remuneration or other conditions of service of members...” [s.2(4) of the Defence (Amendment) Act 1990; see para. 127 above]. To the extent that such “association with” WPDF falls short of “subscribing to” that body, a complete ban on attendance at a WPDF event infringes unnecessarily upon the plaintiff’s right to such association, and is excessive and disproportionate.

ECHR rights

224. As we have seen the plaintiff considers that his rights pursuant to the ECHR have been infringed by the Order, and seeks reliefs at paras. (5) and (6) of the statement of claim accordingly: see para. 11 above.

225. Both sides made substantial submissions as to whether the Order contravened Articles 10 and 11 of the ECHR. Helpfully, the defendants acknowledge that the “...ECtHR has confirmed a number of times that restrictions on the exercise of rights under Article 10 can be placed on military personnel to take account of the unique function which they fulfil in a democratic society...[i]t is also apparent from the Court’s analysis in these cases that the permissibility of restrictions of these rights is considered by reference to the principles of proportionality very similar in terms to the principles applied in an Irish constitutional setting...” [paras. 95-96 defendants’ written submissions].

226. However, a preliminary point was made by the defendant that the Order did not “fall within the broad definition of ‘statutory provision’ set out in s.1 of the European Convention on Human Rights Act 2003 (**‘the 2003 Act’**) and it is noted that the plaintiff’s submissions do not cite any authority for this proposition”.

227. The definition of “statutory provision” in s.1 of the 2003 Act is as follows: -

“‘statutory provision’ means any provision of an Act of the Oireachtas or of any order, regulation, rule, licence, bye-law or other like document made, issued or otherwise created thereunder or any statute, order, regulation, rule, licence, bye-law or other like document made, issued or otherwise created under a statute which continued in force by virtue of Article 50 of the Constitution”.

The section further provides that “rule of law includes common law”.

228. In his submissions, at the conclusion of the case, counsel for the plaintiff commented as follows: -

“...Even if the Order under challenge is...not a statutory provision or a rule of law...within the meaning of the 2003 European Convention of Human Rights Act section 103 clearly is. We are saying that if the court were to accept the expansive interpretation of s.103 that is being urged by the State we are inviting [the court] to conclude...that construction as giving rise to an entitlement to issue the prohibition that was issued here would be incompatible with Convention rights of my client...”.

229. The defendants contend that s.103(1) – undoubtedly a statutory provision – entitled Commandant Sharkey to issue the Order prohibiting members of the Defence Forces from attending the event. I have held that, correctly construed, the section prohibits members from “subscribing to” a “political organisation” such as WPDF, but does not prohibit attendance at a meeting without more. It is not apparent to me that there is necessarily anything in principle objectionable, from an ECHR point of view, in the terms of s.103; however, it does not provide a statutory basis for the making of the Order, which infringed to an impermissible extent the rights of the plaintiff.

230. It was submitted on behalf of the plaintiff that he had always been concerned with “the new suggestion that the Order was somehow made under a generalised command

structure jurisdiction...that is not pleaded, it is not in the case..." [day 8, p.136, lines 1 to 6].

Counsel went on to submit that: -

"...Even if the court finds that the power in respect of discipline has been delegated to the Chief of Staff and sub-delegated to the Deputy Chief of Staff and even if the court concludes that it provides a *vires* for the making of an order we say that a restriction on constitutional rights under normal standards, a restriction on constitutional rights ought to be prescribed by law either by way of legislation or ministerial regulation, and we are not aware of any such."

231. Counsel makes the point that the perceived ambivalence as to how the Order derived its jurisdiction necessitated the correspondence halfway through the trial: see paras. 142 to 144 above. Counsel submitted that "...insofar as there is a reliance upon what I understand to be the delegated power on the Deputy Chiefs of Staff and insofar as they are arguing for an expansive interpretation of s.103 either, or both, would be, we suggest, a statutory provision or rule of law which is cutting across the Convention rights of my client".

232. However, it does not seem to me that the Order itself falls within the definition of "statutory provision" or "rule of law" under s.1 of the 2003 Act such as would entitle the plaintiff to a declaration of incompatibility under s.5 of the 2003 Act. Section 5(1) of that Act is as follows:

"(1) In any proceedings, the High Court, the Court of Appeal or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this act as 'a declaration of incompatibility') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions."

233. It is notable also that s.5(1) provides for a declaration of incompatibility to be made “where no other legal remedy is adequate and available...”. It seems to me that the plaintiff will have sufficient remedy arising from the finding of this Court that the Order is *ultra vires* as being disproportionate and in breach of constitutional rights. In the circumstances, I consider that reliefs numbers 5 and 6 above are neither appropriate nor necessary.

Use of redress procedures

234. Finally, I should make clear that I consider that the plaintiff was fully entitled to initiate the present proceedings, and was not in any way obliged or constrained to raise the matters of which he complained through the redress procedures under s.114 of the Defence Act 1954. The issues which arose were wholly unsuited to being resolved by those procedures, which are not designed or intended to deal with issues of the type or complexity involved in the present case.

Conclusion and orders

235. In the premises, I consider that the plaintiff has succeeded in establishing that the Order of 29 August 2018 was *ultra vires* and issued in breach of the plaintiff’s constitutional rights.

236. As a concluding observation, I would like to acknowledge the good faith and sincerely held convictions on both sides of the dispute. It was very clear to me that the case involved important points of principle from the point of view of both plaintiff and defendants. The issue of what members of the Defence Forces may or may not do off duty in relation to matters which might be deemed “political” is a difficult issue; however, it is an area which requires regulation by the Minister in a manner which takes account of the interests and sensitivities of all concerned.

237. I wish to give the parties an opportunity to consider this judgment and to confer as to the form of orders to be made, including in relation to costs. I will list the matter for mention

only on Friday 31 May at 10.30am to be addressed in this regard, although the parties have liberty to apply in advance of that date if necessary.