



Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

Jonathan Dowdall v. The Director of Public Prosecutions, The Minister for Justice, Dáil Éireann, Ireland and the Attorney General; Gerard Hutch v. The Director of Public Prosecutions, The Minister for Justice, Dáil Éireann and Seanad Éireann, Ireland and the Attorney General.

On appeal from: [2022] IEHC 81

Judgment delivered on 29 July, 2022.

[2022] IESC 36.

Headline

The Supreme Court rejected this appeal. In doing so, it held that the Offences Against the State Act, 1939 (“the 1939 Act”) does not contain a test of ‘permanence’ by which to gauge the lawfulness of the existence of the Special Criminal Court – rather the test of lawfulness is contained within the statute itself: whether or not the Government is of opinion that the ordinary courts are adequate to secure the administration of justice and the preservation of public peace and order. In addition, it held that no duty attaches to Dáil Éireann to continuously review the necessity of the Special Criminal Court, and while such a duty attaching to Government is implied by the statute, this does not require the kind of formal review process contended for by the appellants and in any event, any such duty had been complied with. Finally, the Court reviewed the principles on which an *amicus curiae* is permitted joinder to proceedings and held that the Irish Human Rights and Equality Commission (“the Commission”) had not met the requirements therein.

Composition of Court

O’Donnell C.J., Charleton, O’Malley, Hogan and Murray JJ.

Judgments

O’Donnell C.J. (with whom Charleton, O’Malley and Murray JJ. agreed; Hogan J. concurring).

Background to the Appeal

Both Jonathan Dowdall and Gerard Hutch (“the appellants”) were brought before Special Criminal Court No. 1 on separate dates and charged with the murder of David Byrne at the Regency Hotel, Swords Road, Whitehall, Dublin 9. In each hearing the Director of Public Prosecutions (“the DPP”) informed the Court that she had certified, pursuant to s. 47(2) of the 1939 Act that the ordinary courts were inadequate to secure the administration of justice and the preservation of public peace and order and that it was intended to try the appellants before the Special Criminal Court. The appellants challenged this decision in the High Court, were unsuccessful, and were subsequently granted leave to appeal directly to the Supreme Court in what is referred to as a ‘leapfrog appeal’. Two broad issues arose on appeal. First, it was contended that when the Government made the proclamation in 1972, pursuant to the 1939 Act, bringing the current Special Criminal Court into existence, it intended that the Court be temporary, and that this was contemplated by the Act, but the Court was in fact operating on a permanent basis and this rendered it unlawful. Secondly, counsel for the appellants claimed that the 1939 Act imposes a duty on both the Government and Dáil

Éireann to keep the need for the Special Criminal Court under review and that they have failed to meet this duty. In addition, the Commission sought to join the hearing as an *amicus curiae*, and were permitted to make submissions on a provisional basis, the Court reserving to the decision in the case the question of whether the joinder of the Commission was permitted in accordance with the principles applicable to the joinder of an *amicus curiae*.

Reasons for the Judgment

Regarding the first issue, O'Donnell C.J. held that the interpretation of the 1939 Act contended for by the appellants – whereby the current Special Criminal Court moved from being a lawful, temporary court and became an unlawful, permanent court at some undefined point – would, if correct, be surprising. He held that it would be unusual for the Oireachtas, in passing legislation permitting for the establishment of a Special Criminal Court, itself contemplated by the Constitution, to construct the Court on such a precarious foundation. Furthermore, he held, this test of 'permanence' to gauge the legality of the Special Criminal Court would be at odds with the actual test provided for in the statute and by the Constitution: the necessity created by certain circumstances in which the ordinary courts were considered inadequate to secure the administration of justice and to secure public peace and order. Consequently, it would not be for the Courts to determine by reference to a suggested test of 'permanence' the legality of the Special Criminal Court. That said, O'Donnell C.J. noted, it would not be the case that the actions of the Government in making a proclamation to bring Part V into effect or to make a subsequent proclamation to take it out of effect is non-justiciable, as was suggested in the High Court. He held that the decision was justiciable; for example, the Courts would be entitled to review whether the Government had complied with the requirements of s. 35(2) of the 1939 Act. Finally, he held that it was incorrect to regard the decision of the Government pursuant to either s. 35(2) or s. 35(4) as an exercise of executive power – it was indeed a power entrusted by statute to the Executive but was not by virtue of that fact part of the executive power of the State exercisable by the Government under Article 28.2 of the Constitution. Consequently, O'Donnell C.J. rejected the appellants' contention that the current Special Criminal Court was operating *ultra vires* of the 1939 Act because it was now alleged to be operating as a permanent court by rejecting the premise that this was in itself a condition of legality in the first place. **[26-41]**

Regarding the second issue, the question of review of the necessity for the Special Criminal Court by the Government and Dáil Éireann, O'Donnell C.J. dealt firstly with the latter party. He held that the Dáil was not under a statutory duty enforceable by court action to review the necessity for the Court in order to exercise its functions under s. 35(5) – indeed, the language of the statute placed no restrictions on the power of the Dáil to annul a proclamation made by the Government pursuant to s. 35(2). Regarding the Government, he held that whenever the Government makes a proclamation under s. 35(4), it must do so in good faith, and this implied that the Government must review the circumstances in the country in order to be in a position to do so. However, that does not require a formal review procedure or any periodic review. In any event, O'Donnell C.J. was satisfied that the trial judge was correct to conclude that the Government had met this duty and, indeed, had surpassed what was required. **[42-44]**

Finally, regarding the role of the Commission as *amicus curiae*, O'Donnell C.J. noted that while at one level, it might be of some benefit to have further analysis and argument on the law, it is not the practice of the courts to allow parties to seek joinder as *amicus* simply on this basis. This was for a multitude of reasons, including practicalities of cost and time, but also because proceedings arise between the parties in dispute and any addition to that must be justified. Consequently, it must be the case that the function of any *amicus curiae* is that it assists the Court in resolving the case before it. It follows that it is not the function of an *amicus curiae* to seek to address matters not relevant to the determination of the dispute. In this case, he held, the Commission's submissions were entirely different to the claim made in these proceedings, and indeed ran contrary to aspects of the case made by the appellants. As a result, O'Donnell C.J. held that the application made by the Commission to be permitted joinder to the proceedings did not satisfy the general principles on which an *amicus* may be permitted to participate in an appeal. **[45-53]**

In his concurring judgment Hogan J. first provided some historical context to the development of the Special Criminal Court. He noted, in particular, how the operation of the Court is carefully prescribed by ss. 46 and 47 of the Offences against the State Act 1939 as required by Article 38.3.1 and 38.3.2. of the Constitution, unlike its predecessor – established under Article 2A of the Constitution of the Irish Free State (as inserted by Constitution (Amendment No. 17) Act 1931) – which was described as a “complete departure from legal methods” in use in ordinary courts. **[1-8]**

Hogan J. then turned to consider the wording of s. 35(2), s. 35(4) and s. 35(5) of the 1939 Act itself. He agreed that while s. 35(2) provides that the Government *may* make a proclamation when it forms the view that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order, under s. 35(4) the Government is not at large when it comes to rescinding any such proclamation: the Government may *only* rescind a Proclamation when it is satisfied that the ordinary courts are in fact adequate to secure the effective administration of justice and the preservation of public peace and order. Hogan J. pointed out that this is quite different from the position which obtains with respect to either the powers of Dáil Éireann under s. 35(5), or the powers of the Government under the old Article 2A of the Irish Free State Constitution. This, Hogan J. reasoned, indicated that a Proclamation made under s. 35(2) of the 1939 Act subsists and remains in operation *unless and until* the Government makes a further Proclamation under s. 35(4) to the effect that it is satisfied as to the adequacy of the ordinary court to secure the effective administration of justice and the preservation of public peace and order. Given the Government has not made such a proclamation here, Hogan J. agreed that the appellants appeal should be dismissed **[13-21]**.

References in square brackets are to paragraphs in the judgments of O'Donnell C.J. and Hogan J. respectively.

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Case history

05 July 2022

[\[2022\] IESCDET 61](#)

[\[2022\] IEHC 81](#)

Oral submissions made before the Court

Supreme Court Determination granting leave

Judgment of the High Court (**judgment which was the subject of the appeal to the Supreme Court**)