AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2022:000031

O'Donnell C.J.
Charleton J.
O'Malley J.
Hogan J.
Murray J.

Between/

JONATHAN DOWDALL

Appellant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR JUSTICE, DÁIL ÉIREANN, IRELAND AND THE ATTORNEY GENERAL

Respondents

Heard together with

S:AP:IE:2022:000032

Between/

GERARD HUTCH

Appellant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR JUSTICE, DÁIL ÉIREANN AND SEANAD ÉIREANN, IRELAND AND THE ATTORNEY GENERAL

Respondents

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on 29 July, 2022.

A. Background

1. Article 38.3.1° of the Constitution makes provision for the establishment by law of special courts for the trial of offences in cases where it is determined, in accordance with such law, that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. Article 38.5 provides for exceptions to the general rule that a person tried on any criminal charge must be tried by jury and demarcates the trial of offences pursuant to Article 38.3.1° as one such exception.

2. Part V of the Offences Against the State Act, 1939 ("the 1939 Act") permits the trial of a person before the Special Criminal Court, a non-jury court, in respect of offences scheduled by the Government or following the requisite certification by the Director of Public Prosecutions ("the first respondent") for a non-scheduled offence. As this appeal largely concerns the interpretation of s. 35 of the 1939 Act, it is worth setting out the section in full:-

> "(1) This Part of this Act shall not come into or be in force save as and when and for so long as is provided by the subsequent sub-sections of this section.
>
> (2) If and whenever and so often as the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and that it is therefore necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid and ordering that this Part of this Act shall come into force.

(3) Whenever the Government makes and publishes, under the next preceding sub-section of this section, such proclamation as is mentioned in that sub-section, this Part of this Act shall come into force forthwith.

(4) If at any time while this Part of this Act is in force the Government is satisfied that the ordinary courts are adequate to secure the effective administration of justice and the preservation of public peace and order, the Government shall make and publish a proclamation declaring that this Part of this Act shall cease to be in force, and thereupon this Part of this Act shall forthwith cease to be in force.

(5) It shall be lawful for Dáil Éireann, at any time while this Part of this Act is in force, to pass a resolution annulling the proclamation by virtue of which this Part of this Act is then in force, and thereupon such proclamation shall be annulled and this Part of this Act shall cease to be in force, but without prejudice to the validity of anything done under this Part of this Act after the making of such proclamation and before the passing of such resolution.

(6) A proclamation made by the Government under this section shall be published by publishing a copy thereof in the Iris Oifigiúil and may also be published in any other manner which the Government shall think proper."

The Special Criminal Court operated for the first time from August, 1939 to December, 1946, and then again from November, 1961 to February, 1962. The Court was reintroduced following a Government proclamation on 26 May, 1972, once again bringing Part V of the Offences Against the State Act, 1939 into effect. The Special Criminal Court established pursuant to the proclamation made in 1972 is the same Court that is in existence today. A second Special Criminal Court began

to operate in 2016 in accordance with s. 38(2) of the 1939 Act – the Courts are consequently named Special Criminal Court No. 1 and 2 respectively.

3. These two appeals are being heard together as they raise identical challenges to the appellants' respective hearings before the Special Criminal Court. Each applicant was 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 on 5 February, 2016. In each instance, the Director of Public Prosecutions 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 applicants before the Special Criminal Court.

4. The trial in Special Criminal Court has been fixed to commence on 3 October, 2022. The respective appellants sought to challenge their return for trial before the Special Criminal Court by way of application to the High Court. This challenge was rejected by Barr. J on 11 February, 2022 ([2022] IEHC 81). Given the desirability, indeed necessity, of resolving the issues in advance of the date fixed for trial, and the fact that the issues raised were essentially discrete and defined issues of law, the appellants applied for and were granted leave to appeal directly to this Court on 11 May, 2022 ([2022] IESCDET 61).

B. <u>The High Court</u>

5. The applicants made a number of submissions before the High Court challenging their return for trial before the Special Criminal Court. First, they argued that the power of the Government pursuant to s. 35(2) of the 1939 Act to bring the Special Criminal Court into existence is intended to cater for a particular state of emergency,

and consequently that the Special Criminal Court is intended to be temporary in nature. As the current Special Criminal Court has been in continuous existence for fifty years, they submitted that the Court is of a permanent character and is, therefore, *ultra vires* the 1939 Act. Second, it is argued that the proclamation made by the Government in 1972 was intended to address the then rising levels of so-called "subversive offences". While they accepted that the 1939 Act provides that the Special Criminal Court could prosecute non-subversive offences such as those offences related to organised crime and furthermore that offences connected with "organised crime" were now on the rise, they claimed that a new proclamation would be needed in order to address a novel class of offences such as those relating to organised crime. In other words, they claimed that the original purpose for which the proclamation had been made had effectively expired and/or that it did not apply to the applicants. This, it was argued, was an example of how the Special Criminal Court had become a permanent court when it was intended to be temporary. Thirdly, the applicants submitted that the Executive and Dáil Éireann have a duty to continuously review the necessity for the continued existence of the Special Criminal Court and that they have failed to carry out such a review.

6. In rejecting the reliefs sought by the applicants, Barr J. dealt first with the contention of counsel for the appellants that the Special Criminal Court was intended to be temporary in nature. He held that on a true interpretation of s. 35 of the 1939 Act, there is no temporal limitation on the length of time for which a proclamation bringing Part V of the Act into force can last. Noting that the word "temporary" did not appear anywhere in s. 35, he held that had the Oireachtas intended to limit the duration of a given proclamation, it could have stated so explicitly. Furthermore, he held, the language in s. 35(2) ("if, and whenever and so often as the Government is

satisfied") would seem to reaffirm the lack of some temporal limitation. Barr J. also rejected outright the idea that the Special Criminal Court had become permanent simply because it had been existence for fifty years – while fifty years is a substantial period of time, he held that "temporary does not mean short".

7. In addition, Barr J. noted that the power to bring Part V into existence was entrusted by the Oireachtas to the Executive and consequently, the question of whether the ordinary courts are adequate to secure the effective administration of justice is a purely political question. Consequently, he held, it would not be appropriate for the courts to encroach into the area of executive decision-making by second-guessing the judgement of the Government in making a proclamation under Part V. As long as the Government *bona fide* holds the requisite opinion as to the adequacy of the ordinary courts, Barr J. held that the courts were not entitled to review the making of a proclamation pursuant to s. 35(2). Barr J. also rejected the claim that, because the 1972 proclamation had been made to address the rising number of offences connected with subversive activities, a fresh proclamation was required to address offences connected with organised crime. He held that, once made, such a proclamation will cover those scheduled offences that are stipulated under the Act and the trial of non-scheduled offences when certified by the DPP, irrespective of whether the offences concerned have any connection with subversive activity or not.

8. Finally, regarding the claim that Dáil Éireann and the Executive have a duty to continuously review the necessity for existence of the Special Criminal Court, Barr J. reiterated that the decision made by the Government in 1972 to introduce the proclamation and the decision made by successive governments to continue the proclamation in force (or perhaps more precisely, the decision not to make a countermanding proclamation under section 35(4)) was "a political question, which

is not justiciable before the courts". Even if that were not so, he held he was satisfied that the evidence before the Court clearly established that there has been continuing review of the necessity to maintain Part V.

C. Issues on Appeal

9. The appellants sought leave to appeal to the Supreme Court, which leave was granted in a determination of the Court dated 11 May, 2022. Together with submissions from both the appellants and respondents, the Court received written and oral submissions by the Irish Human Rights and Equality Commission ("the Commission"), which was permitted to intervene as an *amicus curiae* in these proceedings on a basis which will be discussed later. The submissions of the appellants focus on two broad issues:-

I) Whether there is any temporal limitation on the operation of the Special Criminal Court, ("the temporal issue"); and

II) Whether there is, first, a duty on Dáil Éireann/the Executive to keep the necessity of having the Special Criminal Court under continuous review and, second, whether they have failed in this duty ("the duty issue").

The temporal issue

10. The appellants further submitted that, if it is not the case that this is the true literal or ordinary meaning of the legislation, it can be argued that a purposive interpretation should be adopted instead. Citing, *inter alia, DPP (Ivers) v. Murphy* [1999] 1 I.R. 98, they argued that the courts have stressed that legislation should be interpreted in a manner which avoids negating the intention of the legislature and which avoids an absurd result. It is their submission that the intention of the Oireachtas in structuring the 1939 Act the way it did, whereby Part V could be

brought in and out of force, was for Part V to act in a temporary manner. Thus, they submitted that it would defeat such an intention if Part V were allowed to operate as a *de facto* piece of permanent legislation. In support of this, they relied on *dicta* in *DPP v. Quilligan* [1986] I.R. 495 (*"Quilligan"*) and *DPP v. Kavanagh* [1996] 1 I.R. 321 (*"Kavanagh"*), whereby Walsh and Barrington JJ. respectively used terms such as "emergency" in the context of Part V of the 1939 Act.

11. In addition, the appellants submitted that Part V can no longer be said to be in effect as a temporary measure in response to an emergency situation and is now in place as a permanent legal measure. They suggested this is so for a number of reasons. Firstly, they pointed to Part V having now been in force for 50 years, a period of time which they contend is too long to be considered temporary. Secondly, they pointed to Part V having outlasted the emergency which prompted its introduction as they argue Part V was activated to deal with escalating violence associated with the Troubles in Northern Ireland but remains in force "despite the cessation" of same. Thirdly, they argued that the current justification for the continued use of Special Criminal Courts – the fact that offences linked to "organised crime" pose risks in terms of witness or juror intimidation – is not a transient risk and will never fully abate. Therefore, they submitted, Part V is being used in response to a general danger rather than a specific situation of emergency.

12. Finally, the appellants addressed the remarks of Barr J. regarding the decision by successive Governments to maintain Part V in force being a political question which is not justiciable. They submitted that they are not arguing about the merits of the proclamation itself or the merits of keeping it in force, but rather, whether as a matter of law, Part V is in force on a basis which is *ultra vires* the 1939 Act. This, they argued, is not an intrusion by the courts on the functions of the legislative or the

executive branches, but rather it is the courts performing their function to ensure those branches are operating in compliance with the law, and insofar as the operation of the Special Criminal Court engages with the right to a jury trial, the Constitution.

13. Counsel for the Director of Public Prosecutions, the Minister for Justice and Equality ("the second respondent"), the State ("the fourth respondent") and the Attorney General ("the fifth respondent") agreed with both the interpretative method adopted and the interpretation of s. 35 of the 1939 Act applied in the High Court. They submitted that to apply the interpretation suggested by the appellants would be to depart from the natural and ordinary meaning of the statute and, as there is no reason to conclude that the plain text of s. 35 does not represent the intention of the legislature, there is no requirement to employ an alternative interpretative mechanism such as a purposive one.

14. The first, second, fourth and fifth respondents further submitted that, even if a purposive method of interpretation was to be adopted, it would still not yield the meaning contended for by the appellants. They submitted that s. 35 of the 1939 Act makes express provision for the circumstances in which Part V of the 1939 Act will cease to be in force – there is no sunset clause nor is there language which would suggest Part V is subject to a temporal limitation. In response to the *dicta* cited in *Kavanagh* and *Quilligan*, the respective respondents submitted that these *dicta* are not only *obiter*, but they are also removed from their context. Furthermore, they noted that the term "emergency" can describe events covering a prolonged period of time – they cite the climate emergency as an example. Ultimately, they submitted that both *Kavanagh* and *Quilligan* are clear that Part V remains in operation until such time as a proclamation is published by Government or resolution passed by the Oireachtas.

15. Regarding the appellants' submissions that the emergency which prompted the 1972 proclamation has now passed, the respondents questioned the evidential basis of this claim and note that the 1972 proclamation makes no reference to political violence in Northern Ireland or to subversive crime. Finally, the respective respondents submitted that the submissions of the appellants largely concern political or policy-based arguments as to what the 1939 Act could have or should have provided. They noted that it seems "impossible" to identify a constitutional imperative in favour of the establishment of special courts on a permanent basis rather than a temporary one.

The duty issue

16. The appellants submitted that by virtue of s. 35 of the 1939 Act, the Government and Dáil Éireann owe independent and overlapping duties to conduct continued reviews of the need for Part V of the 1939 Act to remain in force. In support of this they cited s.35, ss.(4) and (5) of the 1939 Act and the *dicta* of Barrington J. in *Kavanagh,* where he stated that the Government "has a duty to keep the situation under review" and likewise that the Dáil "would have a similar duty under s. 35, sub-s. 5". They submitted that the trial judge did not engage with the *dicta* from *Kavanagh* in his judgment. In addition, they argued that, as a matter of fact, there is limited material to suggest that regular, meaningful reviews of the necessity of Part V of the 1939 Act are being conducted by the Government and Dáil Éireann. They noted that the last substantive Government review undertaken appears to have been in the form of annual reports produced between 1997 and 2000. They submitted that the 2002 Report of the Committee to Review the Offences Against the State Acts, 1939-1998 and Related Matters ("the Hederman Report") would not be, in and of

itself, sufficient to discharge the duty on the Government and Dáil to keep the 1972 proclamation under periodic review.

17. Furthermore, in engaging with the *dicta* of the trial judge regarding the justiciability of such a review, the appellants submitted that they are not attempting to question the judgement of the Government or the Dáil in deciding whether Part V is required or not, but rather are arguing that both have failed in their respective duties to review the situation in the first place. In addition, they noted that the courts are entitled to review actions of the Executive, in line with the principles set down in *Boland v. An Taoiseach* [1974] I.R. 338 and *Crotty v. An Taoiseach* [1987] I.R. 713.

18. The respondents acknowledged that there is a statutory obligation on the Government to publish a proclamation under s. 35(4) of the 1939 Act when it is satisfied that there is no longer a need to keep Part V in force and that this does imply that the continuation of Part V be kept under consideration. However, they submitted that there is no basis for contending that the same provision imposes the type of formal or periodic process of review contended for by the applicants. They further queried the basis on which the standard of periodic review could be tested by the courts. In addition, they cited several examples of such consideration, such as the establishment of the second Special Criminal Court in 2016 and the annual renewal of the Offences Against the State (Amendment) Act, 1998 and the Criminal Justice (Amendment) Act, 2009.

19. Counsel for Dáil Éireann ("the third respondent") submitted a number of reasons why they said s. 35(5) confers a right and not a duty on Dáil Éireann to review the need for the continued existence of the Special Criminal Court. The general thrust of these submissions related to the language used in the section, which the third respondent contends is "enabling" rather than imposing of a duty, the contrast with

the language used in s. 35(4) and the lack of criteria by reference to which Dáil Éireann may annul a proclamation which they submit would be relevant if such a duty were imposed. They submitted further that there is support in neither *Quilligan* nor *Kavanagh* for such a duty, arguing that the *dicta* of Barrington J. cited as authority by the appellants is all preceded by the phrase "one could accept the submission of the Applicant", which would seem to render Barrington J.'s "acceptance" of such a duty as, in reality, consideration of a hypothetical. Furthermore, they submitted that those statements regarding such a duty on Dáil Éireann must be *obiter,* as *Kavanagh* focused on Government powers under the Act rather than those of the Dáil. They also noted that were there such a duty on Dáil Éireann, there would be issues surrounding the enforceability of such a duty as no enforceable order can be made by the courts as against Dáil Éireann as such.

20. Furthermore, the third respondent submitted that, in no uncertain terms, the function ascribed to Dáil Éireann under s. 35(5) of the 1939 Act is a purely political matter. They cited a number of supporting decisions outlining the purpose of treating certain areas as non-justiciable. It follows, they submitted, that even if there was such a duty to review the continued existence of the Special Criminal Court in the manner that the appellants suggest and if it was the case that the respondents had failed in this duty, it would not follow that the courts could step in to fill this supposed vacuum. In doing so, the third respondent stated, the courts would be, in effect, assuming functions vested in other actors and *de facto* annulling the proclamation.

21. Finally, the third respondent submitted that s. 35(5), enabling the Dáil to make its own decision regarding the necessity of the proclamation, is an example of matters internal to the House, further underscoring their general argument about the non-justiciability of the decision regarding the necessity of the proclamation.

***Submissions of the* amicus curiae**

23. Shortly before the hearing of this appeal, the Commission sought liberty to intervene in the appeal as *amicus curiae.* The application was opposed by the State respondents on the grounds that the issues sought to be addressed by the Commission were not matters within the appeal, and in certain respects ran counter to the case being made by the appellants. A panel of this Court ruled that the question was best addressed in the context of the submissions made at the hearing and the Commission would be permitted to appear at the hearing of the appeal and make submissions on a provisional basis. The Court directed , however that the parties would be at liberty to address the question of whether or not the Commissions submissions came within the scope of the appeal and the functions of *amicus curiae*.

24. Counsel for the Commission made submissions focusing on whether the High Court was correct to hold that a decision that a decision of the Government to make and to maintain a proclamation under Part V of the 1939 Act is non-justiciable as long as the opinion of the Government is *bona fide* held. They submitted, in particular, that the judgment in *Kavanagh* requires reassessment in light of the judgments of O'Donnell C.J. and Charleton J. in *Burke v. Minister for Education and Skills* [2022] IESC 1 (Unreported, Supreme Court, 24 January, 2022) ("*Burke*"). It was the Commission's position that not only is the lawfulness of a proclamation made under Part V of the 1939 Act justiciable, it can be reviewed without constraints such as the application of a 'clear disregard' test.

25. The Commission argued that the Government is acting under Part V of the 1939 Act as a statutory decision-maker, as it was entrusted to do so by the Oireachtas, rather than exercising an inherent executive power. They submitted that, as the

Government is entrusted with this statutory power when deciding whether to make a proclamation, it is applying pre-established criteria set out in Article 38.3.1°. It follows, they argued, that the Government must assess whether the risk of jury interference can be sufficiently mitigated such that the ordinary courts will remain adequate to secure the administration of justice. Furthermore, they submitted that the need for an objectively demonstrated justification for a proclamation is heightened by the practical inability to review of individual prosecutorial decisions taken following the making of a proclamation. Finally, citing *Burke*, they argued that as a proclamation decision will impact on the right to a jury trial in a systemic way, affecting a constitutional right, the 'clear disregard' test does not apply to this case.

D. Discussion

The language of the 1939 Act and the temporal issue

26. The appellants' principal arguments were addressed to matters of statutory interpretation. Those arguments sought to link the words of s. 35(2) "if and whenever and so often" to the observations of Walsh and Griffin JJ. in *Quilligan* and Barrington J. in *Kavanagh*. In *Quilligan*, Walsh J. had said "parts V and VI of the Act may be regarded as emergency provisions because they only come into force and remain in force for so long as the necessary proclamations are in force". Griffin J. for his part said, at p.516-7:- "Parts II, III and IV of the Act are part of the permanent legislation of the State. Part V, which is headed "Special Criminal Courts" is not part of the permanent legislation of the State and is not in force until brought into force in pursuance of s. 35". Later again he said "Parts II, III and IV of

the Act are part of the permanent legislation of the State. Part V, however, is not part of the permanent legislation of the State".

27. The *dicta* in *Quilligan* relied upon by the appellants were presented in the context of a prosecution which did not itself involve a trial in the Special Criminal Court or any considerations of the provisions of Part V. Instead, the case concerned a trial for murder in which the accused had been arrested under s. 30 of the 1939 Act and in which the trial judge had held that such an arrest was invalid, since it was, he considered, a provision which could only be used for subversive-type offences. This conclusion was reversed by the unanimous Supreme Court. However, these observations were repeated in *Kavanagh*, in which the plaintiff was tried in the Special Criminal Court and sought to challenge the continued operation of the proclamation made in 1972, on the basis that there was no reasonable or plausible factual basis for the opinion of the Government and that the ordinary courts were adequate to try the applicant, and who was charged with an offence which had no subversive connotations. At p. 357 Barrington J. said:-

> "In *The People (Director of Public Prosecutions) v. Quilligan* [1986] I.R. 495 Walsh, J. pointed out that there was a marked contrast between Parts II, III and IV of the Offences Against the State Act, 1939, on the one hand, and Part V on the other. Parts II, III and IV were permanent in nature and dealt with activities which were self-evidently subversive. These included, for instance, usurping the functions of Government, the activities of unlawful organisations, and the publication of treasonable or seditious matter. Part V of the Act, by contrast, was in the nature of temporary emergency legislation and dealt with the adequacy of the ordinary courts to secure the effective

administration of justice and a preservation of public peace and order either generally or in relation to a specific kind of crime".

28. The appellants' argument seeks to run the words of the statute "if and whenever and so often" together with the language of Walsh and Barrington JJ. ("emergency measures not part of the permanent legislation of the State" and "temporary emergency legislation") to suggest that the Act must be interpreted as providing for a Special Criminal Court as a temporary measure or subject to a temporal limitation, and thus is not a permanent court. They further contend that the fact that the Special Criminal Court has been in existence for 50 years since the proclamation in 1972, notwithstanding a significant change in the circumstances which can be assumed to have given rise to the necessity for the proclamation in 1972, that a second Special Criminal Court has been established and is in operation, and that there is, as it was put, "no sunset in sight", must mean that the point has been reached where the Court has become permanent. On the appellants' construction of the statute, a permanent court is *ultra vires* the provisions of s.35 (as interpreted) with the consequence that the trial of the appellant before such a court, would be unlawful and must be prohibited.

29. A second argument is derived more directly from the judgment of Barrington J. in *Kavanagh*. There he said:-

> "One could accept the submission of the applicant that once the Government has made a proclamation under s. 35, sub-s. 2 of the Offences Against the State Act, 1939, declaring the ordinary courts to be inadequate to secure the effective administration of justice and bringing Part V of the Act into force, it has a duty to keep the situation under review and to publish a further proclamation declaring that Part V should cease to be in force in the event of

being satisfied that the ordinary courts were adequate to secure the effective administration of justice and the preservation of public peace and order. Likewise, Dáil Éireann would have a similar duty under s. 35, sub-s. 5 to pass a resolution annulling the Government's proclamation bringing Part V of the Act into force should Dáil Éireann be of the opinion that this proclamation was not necessary".

Relying on this passage, it was said that both the Government and Dáil failed in the duty so identified as there has been no periodic formal review of the necessity for the establishment of the Special Criminal Court, carried out by the Government or the Dáil. It is further argued that this asserted breach of duty on the part of the Government and/or the Dáil, gives rise to an entitlement to obtain an order of prohibition restraining the trial of the applicant.

30. The appellants emphasised the narrowness of the claim. Both arguments were essentially matters of the proper interpretation of the statute. There was no challenge to the validity having regard to the Constitution of the provisions of s. 35, or Part V of the Act more generally. It was accepted, furthermore, that Article 38.3 even gave the power to establish a Special Criminal Court on a permanent basis. The argument was that the 1939 Act did not do so and provided for a temporary court only. While a permanent court on this argument was theoretically constitutionally permissible, it was not provided for by this statute. Nor did the appellants challenge in any way the 1972 proclamation – it was accepted that it was valid and effective. It was only the fact that the Court was now being seen as permanent that gave rise to complaint. The appellants accepted the decision in *Kavanagh*, and indeed, as set out above, relied upon it.

31. Since the issue in this case turns on the question of statutory interpretation, it is necessary to carefully consider the statutory language. However, it is, I think, permissible to identify the logical consequences of the interpretation advanced on behalf of the appellants. The interpretation urged by them would, it appears, lead to the conclusion that at some point the Special Criminal Court established pursuant to the proclamation in 1972 bringing into force Part V of the Act, moved from being a "lawful" temporary, or temporally limited, court, and became an "unlawful" permanent court with no jurisdiction to try any accused with the necessary consequence that a trial conducted by the Court, and any conviction or acquittals recorded, would be invalid as made without jurisdiction. The appellants admitted that they could not and did not seek to identify with any precision the point at which the Court moved from temporary to permanent and from legality to illegality. That, it was said, was a matter of degree and it was enough that the Court should now be determined to be permanent, without identifying the precise point at which the legal boundary was crossed. It follows that, on this argument, the Act itself does not identify any precise point after which the Court, once lawfully established, becomes unlawful and loses jurisdiction, nor does it provide any formula by which that point can be calculated. It is ultimately for a matter a court to say definitively, in any given case, whether that point has been reached or not.

32. This, the appellants argue, is how the Act must be construed, and it follows that this conclusion must further be understood to be the intention of the Oireachtas. I think it is a permissible starting point to observe, that it would indeed be startling if the Oireachtas, in the course of passing legislation to deal with a perceived and serious threat to the existence of the State itself, and permitting for the establishment of a Special Criminal Court because of the possibility contemplated by the Constitution,

that the circumstances may be such that the ordinary courts were inadequate to secure the administration of justice, would nevertheless, construct the Court on such a precarious, vague and inherently uncertain foundation.

33. Such a construction of the Act would, as counsel for the State respondents argued, introduce a different metric into the Act, that of "permanence", which was itself at odds with the metric established both by the Constitution and the Act, that is, a necessity created by certain circumstances in which the ordinary courts were considered inadequate to secure the administration of justice and the securing of public peace and order. There is no reason why that necessity should not continue to apply after the point at which, on this argument, it was determined that the temporary passed into the permanent, but on the appellants' arguments the Special Criminal Court would at a certain point become incapable of exercising jurisdiction to try cases even though the ordinary courts were inadequate to secure the administration of justice.

34. The contention for which the appellants contend is only capable of being reached by attempting to construe the statutory provision by a method of interpretation that pulls together fragments of statutory and judicial language to determine that the Special Criminal Court established under the Act must be non-permanent as a matter of law and furthermore subject to a requirement of temporariness or, some temporal limitation which must be fixed by the Government or determined by the courts. The Act does not say so in terms, and in my judgement, the text, language, and structure of the Act, cannot be construed to reach such a conclusion. In order to understand why this is so, it is necessary to turn to the specific statutory provision.

35. The provisions of Part V of the Offences Against the State Act have been set out at para. 2 above. The shoulder note to s. 35 reads "commencement and cesser of this

part of the Act". Section 18(1)(g) of the Interpretation Act, 2005 precludes consideration of marginal or side notes other than for the purposes of s. 5 (resolution of ambiguity or obscurity, avoidance of ambiguity, or achievement of the plain intention of the Oireachtas) or s.6 (updating construction). It is not clear to me why these notes should be available for some interpretive purposes and not others, and in any event, ambiguity is never too far from any statutory provision that is the subject of legal argument requiring judicial resolution. The provisions of s. 18 (1)(g) seem to reflect an outdated view of what is or is not contained in legislation. I can see no good reason not to have regard to something that the Oireachtas has authorised to be published in legislation. Courts approach such notes with a degree of caution, recognising that they may not be a fully accurate summary of the words in the section, but there may be cases where they shed light on text that is otherwise difficult or complex. A blanket rule against consideration of such material seems to reflect an unnecessary rigidity masquerading as purity, and which requires a degree of compartmentalisation that is difficult, if not impossible, in practice. And a partial rule seems impossible to justify, unless it is to be understood as little more than the common sense observation that marginal notes should not be used to create ambiguity, but may be considered to resolve it. In this case I will limit myself to the observation that the text of s. 35 deals with the commencement and termination of Part V of the Act.

36. A number of features of the section deserve comment. Section 35(2) provides that it is the Government which must be satisfied of the inadequacy of the ordinary courts and that it is necessary that Part V of the Act establishing Special Criminal Courts should come into force. But the Government still retains a discretion. The Government *may* make and publish a proclamation declaring that the Government

is so satisfied, which brings Part V of the Act into force pursuant to the provisions of s. 35(3). Sub-sections 35(4) and (5) provide for what the marginal note describes as "the cesser" of Part V and the distinctions between those provisions and the initiating provisions of s. 35(2) in this regard deserve note. Section 35(4) provides that where the Government is satisfied the ordinary courts are adequate to secure the effective administration of justice and the preservation of public peace and order, the Government *shall* make and publish a proclamation declaring that this part of the Act shall cease to be in force and thereupon Part V *shall* forthwith cease to be in force.

37. Two features of this sub-section deserve note. First, it is clear from the word italicised, and the deliberate difference from the language of s. 35(2) that s. 35(4) imposes a statutory duty upon the Government which is triggered by the Government forming the opinion set out. Second, the requisite opinion is <u>not</u> the fact that the Government no longer holds the opinion required under s. 35(2). Instead, it is necessary for the Government positively to hold the contrary opinion that ordinary courts are adequate to secure the effective administration of justice. Again, this distinction appears deliberate, and can be illustrated by considering the operation of the Act in circumstances where the Government was uncertain as to whether the ordinary courts were adequate to secure the effective administration of justice and preservation of public peace and order. That state of mind would not be sufficient to make a proclamation under s. 35(2), but it would also not permit the making of the contrary proclamation under s. 35(4). Therefore, if the Government had properly formed the opinion under s. 35(2) and Part V had been brought into being, the subsequent absence of an opinion as to the adequacy of the ordinary courts, or uncertainty in that regard, would not themselves bring the operation of

Part V (and the Special Criminal Court) to an end; it would be necessary for the Government to be satisfied that the ordinary courts were adequate to secure the administration of justice.

38. This consideration of the subsection also leads to an appreciation of how circumscribed the Government's powers are under the Act. If satisfied, in accordance with s. 35(4) as to the adequacy of the ordinary courts, then it has no discretion: it is under a statutory duty to make and publish the necessary proclamation. Thus, notwithstanding the fact that Special Courts are specifically contemplated by the Constitution under Art. 38 and are obliged to conduct trials in due course of law, the Government, once forming the opinion on the adequacy of the ordinary courts, would not be entitled to maintain Part V in force for reasons of convenience or efficiency or public popularity, no matter how compelling those considerations might be in any particular case. By the same token, however, the only circumstances in which the Government is empowered to bring the operation of Part V to an end, are those specifically set out in s. 35(4). Thus, it would not be open to the Government to conclude that as a matter of policy Part V should cease to be in force, or that even if the ordinary courts were not adequate to secure the effective administration of justice, then that was in the overall an acceptable price to pay for maintaining the principle of trial in the ordinary courts, and where applicable, before a jury. Nor, it appears, could a Government simply decide to withdraw the proclamation because it was no longer positively satisfied of the inadequacy of the ordinary courts to secure the effective administration of justice, or simply because it judged it in the public interest to do so; the only circumstances in which Part V may cease to be in force by action of the Government, are those set out and clearly

delimited in s. 35(4). This conclusion is reinforced by a comparison of s. 35(4) of the next succeeding subsection dealing with the powers of Dáil Éireann.

39. Section 35(5) provides for the power of Dáil Éireann to pass a resolution at any time in which Part V of the Act is in force, which, in common with the proclamation of the Government under s. 35(4), has the consequence that Part V of the Act shall cease to be in force. However, there are marked distinctions. First, the passing of a resolution by Dáil Éireann is not predicated upon the Dáil forming any opinion or being satisfied of any matter or indeed taking any view on the adequacy of the ordinary courts to secure the effective administration of justice and the preservation of public peace and order, or any other matter. The power is entirely unconstrained. Second, the passage of such a resolution has the effect of *annulling* the original proclamation. For that reason, the subsection makes the consequential provision for the fact that such annulment is without prejudice to the validity of anything done under Part V between the period of making such proclamation and the passage of a resolution. It was not necessary to include any such saver under s. 35(4) because the exercise by the Government of its powers under that subsection did not affect the original proclamation made under s. 35(2); instead, a separate and contrary proclamation is put in place taking effect from that point and depriving the first proclamation under s. 35(2) of effect so that from that point, Part V of the Act would not be in force. The first proclamation is not annulled, and anything done under it remains valid without any statutory intervention. The proclamation is simply superseded by a contrary proclamation which takes effect from that point.

40. The operation of Part V must be understood within the framework of the detailed constitutional and statutory framework providing for its establishment operation and cessation. This can be set out in a number of propositions as follows:

i.The creation of the Special Criminal Court is specifically contemplated by the Constitution. The "ordinary courts" are those established under Art. 34. It follows that a Special Court is not intended by the Constitution to be the norm;

ii.The Constitution itself provides that a Special Criminal Court shall be established by law and further establishes the circumstances in which it may be established: when it is determined in accordance with that law that the ordinary courts are inadequate to secure the administration of justice and the preservation of public peace and order ("the adequacy determination"). Accordingly, legislation is required for establishment and the adequacy determination. The Constitution does not itself prescribe any duration for a special court once established;

iii.The Constitution also provides that the constitutional powers, jurisdiction and procedures of such be prescribed by law, (although not necessarily the same law providing for the constitution of the Court and the adequacy determination);

iv.The Constitution provides that Arts. 34 and 35 in respect of the ordinary courts and the judges appointed to them, shall not apply to the Special Criminal Court established pursuant to Art. 38.3. In every other respect, however, a Special Criminal Court is subject to the Constitution and in particular, trials before such courts must be trials in due course of law under Art. 38;

v.Any law enacted for the purposes of Art. 38.3 must itself accord with the Constitution. If any such law were challenged, the question would simply be if such legislation was consistent with the Constitution. Since, however, the creation of special courts is contemplated by the Constitution, it would not be

correct to approach that question as if a trial in the ordinary courts is a constitutional right, interference with which requires justification or the application of a proportionality test;

vi.The law currently enacted, pursuant to Art. 38.3, is the Offences Against the State Act, 1939 (as amended). That Act both established the Court (s. 38) and made provision for the adequacy determination (s. 35);

vii.The mechanism set out in s. 35 is that such determination shall be made by the Government, and on such determination, Part V of the Act will come into force;

viii.It is perhaps, therefore, not entirely accurate to say that Part V is not part of the permanent legislation of the State. It was passed by the Houses of the Oireachtas, signed by the President, and is on the statute book and is a law duly enacted, and capable of having effect. When a Government makes a proclamation under s. 35(2) it takes effect as a matter of law, because there is a law setting out the consequences of such a proclamation. It is not necessary to pass new or fresh legislation to establish a Special Criminal Court. It is perhaps more correct to say, therefore, that Part V of the Act is not part of the permanent legislation of the State *in force* at any given time;

ix.The references in *Quilligan* to the permanent nature of the law in force under Parts I to IV of the Act were directed towards an argument that the power of arrest under s. 30 (which is contained in Part IV) was limited to subversive-type offences, and by extension the existence of the Special Criminal Court. In concluding that s. 30 arrests were not so limited, and could be utilised in respect of scheduled offences which would be tried in the ordinary courts, it was pointed out that s. 30 was part of the Act which was in

force since enactment, and did not require any proclamation or other act to bring it into force from time to time. This, in itself, does not imply anything as to the nature of a Special Criminal Court when established under Part V;

x.Section 35(2) provides that the mechanism for bringing Part V into force and establishing a Special Criminal Court under s. 38, is a proclamation issued by the Government. That proclamation must be made and published by the Government, must order that Part V of the Act shall come into force, and is made only when the Government is satisfied both that the ordinary courts are inadequate to secure the effective administration of justice and preservation of public peace, and that it is, therefore, necessary that Part V should come into force;

xi.The reference to "the Government" in s. 35 does not have the effect of constituting the power under s. 35 as part of the executive power of the State under Art. 28.2. The power to determine the adequacy of the ordinary courts is not treated by the Constitution as part of the executive power under Art. 28.2, and is not inherently a power which can only be exercised by the executive. Any other mechanism or body could have been utilised for the purposes of the determination required under Art. 38.3. The power exercised by the Government, is accordingly one conferred by statute;

xii.It is inaccurate, therefore, to suggest that the actions of the Government under s. 35 are either non-justiciable, or non-justiciable save only for *mala fides,* or can only be challenged on grounds of "clear disregard". First, the decision is plainly justiciable: if the provisions of s. 35(2) were not complied with, so that it was established, for example, that the Government had not been satisfied as to inadequacy, or had not made or published the proclamation, a

court would be fully entitled to so determine and declare any consequential invalidity;

xiii. Second, the reference to "clear disregard" test in this context is also potentially misleading. Such a test only arises when it is contended that the Government has exercised the executive power of the State in clear disregard of the provisions of the Constitution, as set down in *Burke.* That test is not relevant here for at least two reasons. The power being exercised under s. 35(2) is not the executive power of the State under Art. 28.2, as already mentioned. The challenge made here is not a challenge to the validity of the Act, or a contention that its operation is contrary to the Constitution or invades any constitutional right. Nor is the exercise of the Government's power under s. 35(2) challenged. The argument here is simply that the continued existence of the Special Criminal Court is *ultra vires* the provisions of the Act. That is an issue which depends on a question of statutory interpretation. If the appellants are correct in their interpretation of the Act, and in their contention that the Court is now a permanent court and *ultra vires* the Act (as so interpreted) then they are entitled to succeed and it is not necessary for such an argument to consider compatibility (however expressed, and by whatever standard) with the Constitution;

xiv.The fact that it is the Government which is selected by statute as the body to make the determination contemplated under Art. 38.3, is, however, not irrelevant to the nature of any challenge to the exercise of that power. It is a recognition that the decision must be made collectively by the Government, like other decisions, by reference to what might be considered broad political considerations, and broad judgements which the Government is empowered

to make and makes regularly, both as to the condition of the country and the course that is necessary at any given time. In that sense, it is certainly akin to the exercise of executive power under the Constitution and it is not in this case subject to statutory preconditions. As Barrington J. observed in *Kavanagh*, there is a logic to this since the determination required is a broad one as to the adequacy of the courts system to secure the administration of justice and the preservation of public peace and order, and the necessity for the establishment of a Special Criminal Court;

xv.It is plain that the Act does not contemplate a court review of the substance or merits of the decision. The function of the Court is limited by virtue of the function contemplated by the Constitution, and provided for by the Act – the ascertainment that the statutory requirements have been met, and the determination has been made *bona fide* to the body to whom it is entrusted;

xvi.The language of s. 35(2) "[if and whenever and so often]" contemplates that the circumstances to which it is directed – that the ordinary courts are inadequate to secure the administration of justice and the preservation of public peace and order – may occur on more than one occasion during the lifetime of the Act, and, therefore, that the coming into force of Part V, and its cesser pursuant to s. 35(4) or s. 35(5) does not preclude a further proclamation under s. 35(2) bringing Part V into force again. It follows that it can be said that the section contemplates that such circumstances might be temporary in nature. But that is directed to the circumstances permitting the bringing into force of Part V and the consequent establishment of the Special Criminal Court. It does not address or qualify the period during which Part V is in force and the Court is in existence, nor does it qualify the cesser of Part

V and, therefore, the Court. The conditions set out in s. 35 identify the circumstances in which Part V may be brought into force and the Special Criminal Court established; once the condition is satisfied, the Court stands established. The circumstances in which Part V ceases to be in force (and the Court is no longer established or in existence) are also provided for the statute and set out in ss.35(4) and 35(5);

xvii.It can properly be said that Part V of the Act and the Court are, therefore, subject to limitation – but that limitation is fixed by the Act itself, and not to be inferred from some concept of temporal limitation, or permanence. Part V comes into force on the making of the proclamation under s. 35(2) and ceases in circumstances provided for by either s. 35(4) or s. 35(5); once a proclamation is made under s. 35(2) and for so long as no counter proclamation is made under s. 35(4) or annulment under s. 35(5) is made, then Part V is in force and the Court is validly established;

xviii.Since cesser of Part V, and with it reversion to the normal courts, is dependent in the first place, therefore, on a counter proclamation of the Government under s. 35(4) and that proclamation is in turn dependent on the Government making a positive determination that the ordinary courts are adequate to secure the administration of justice and the preservation of public peace and order and such a determination must be made *bona fide*, it follows, as set out by Barrington J. in *Kavanagh*, that the Government is obliged to keep the situation under review to permit it, if necessary, to make the relevant determination;

xix.There is no formality required in that process and in particular there is no requirement of periodic formal review. It is to be expected that the

Government will act as it normally does, with access to departmental information and advice, security information, and with the general experience of a body made up of popularly elected representatives. However, it can be said that, as times goes on, it is to be expected that, of necessity, more focused scrutiny will be applied to the question of the necessity for a Special Criminal Court. If it is suggested that the original circumstances giving rise to the need for a special court no longer apply, but that other circumstances exist which mean that the ordinary courts are inadequate to secure the administration of justice in certain cases, then once again, it is to be expected that the question would require a careful consideration. For example, there may be factors present in respect of one type of crime, whether loyalty to an organisation or a habit of respect for it, or the unpopularity of certain offences, which might interfere with the ordinary courts' ability to secure the administration of justice in addition to any considerations of intimidation of witnesses. In other cases, that factor may be the only relevant but decisive one. These are matters which are to be evaluated as part of a consideration of the exercise or non-exercise of the powers under s. 35;

xx.It does not follow, however, that the Dáil is under a similar duty. Section 35(5) is structured quite differently to s. 35(4): the Dáil is not obliged to come to any determination on adequacy as a condition of making an order of annulment and if it did collectively come to such a conclusion, it is not placed under a statutory duty to pass any resolution annulling the original proclamation. The only power the Dáil has is to annul the original proclamation. This is the form of review available for the exercise by the Government of its power under s. 35(2) and indeed, for any refusal to make a

determination under s. 35(4). The Dáil as a representative and deliberative assembly is at large as to the circumstances in which it would consider it appropriate to annul the proclamation. It is entirely conceivable that different members may assent to that resolution taking different views on the question of adequacy, or indeed as to the necessity or desirability for a Special Criminal Court notwithstanding their views as to adequacy. It would seem to follow that it cannot be said that the Dáil is under any duty to keep matters under review. The power to annul may be exercised with or without a formal or informal process of review;

xxi.A statutory duty on the Dáil to annul in certain specified circumstances enforceable by court proceedings, or an implied duty to review would also appear to be inconsistent with the general principle that the Dáil as a House of the Oireachtas is entitled to make its own rules and orders (Art. 15.10) and generally speaking is master of its own proceedings insofar as it concerns its members and proceedings. In addition, members of the Dáil are not answerable to any court for any utterance made in the Dáil (Art 15.13). If a statute were to impose a legally enforceable duty on the Dáil (either to annul or to review) it is to be expected that it would be carefully drawn to avoid interference with the constitutionally-protected autonomy of the Dáil in respect of its own procedures and business. The Act does not do so. It cannot be said that the unrestricted power to annul conferred upon the Dáil imposes a duty to review;

xxii.If there was a failure to comply with the duty to review on the part of the Government, that itself would not validate Part V, or the Court, or any proceedings in it. If a breach of duty was established, the remedy would be

mandamus to compel performance of the review. Since such a review could result in a conclusion that the Government was not satisfied that the ordinary courts were adequate then no counter proclamation could issue, and Part V would remain in force. While it is possible that a court might restrain or prohibit the trial of an individual before the Court pending the carrying out of such a review and the making of a determination it would not be appropriate to prohibit a trial absolutely.

41. It is apparent from a consideration of the foregoing that the trial of a person before the Special Criminal Court involves a number of steps prescribed by law. It is necessary that there be a constitutional provision permitting the existence of a Special Criminal Court (Art. 38.3) and setting out criteria for that existence, a law enacted pursuant to the Constitution complying with it and establishing the Court, and a law establishing the procedure, power and jurisdiction of the Court. At present, that function is performed by the Offences Against the State Act, 1939; this in turn requires a determination by Government in accordance with s. 35(2) and the making and publication of a proclamation pursuant to that section, and no counter proclamation under s. 35(4) or annulment of the proclamation under s. 35(5). These issues are justiciable. It is further clear that in the case of both scheduled and non-scheduled offences,(summary and indictable) that certain steps must be taken, or abstained from by the DPP, all of which is reviewable in accordance with the criteria set out in *Murphy v. DPP* [2009] 3 I.R. 821, [2009] IESC 53.

42. It follows from the above that it is possible to raise challenges at a number of different stages in this process. Here, the challenge is relatively narrow and relates only to the interpretation of s. 35, and the question of any implied duty to keep the position under review to permit the powers under s.35 to be exercised. It is apparent

from the analysis already set out that the applicants' contention is misconceived and misconstrues the Act as understood in its constitutional setting. It cannot be said that either Part V of the Act, or the Special Criminal Court, must be understood to be subject to an implied condition of temporariness, or non-permanence, so that at some unspecified point before a proclamation under s. 35(4) or an annulment under s. 35(5), the Court would lose jurisdiction to try offences. The circumstances under which Part V comes into force and the Court is established, and the circumstances in which Part V ceases, and with it the establishment of the Court, are precisely identified in the Act. So long as a proclamation has been made under s. 35(2) which has not been annulled under s. 35(5) and no countervailing proclamation made under s. 35(4) then Part V is in force and the Court is validly established and no additional condition of non-permanence can be implied.

The language of the 1939 Act and the duty issue

43. As discussed above, the Dáil is not under a statutory duty enforceable by court action to review circumstances to consider the exercise of its functions under s. 35(5). That section provides that the Dáil has power in the course of its business to annul a proclamation made for good reason, or, indeed, for no reason. In order to exercise that function, neither the Dáil, nor any member thereof, is required to satisfy any statutory condition nor can it be said to be under any duty, if it comes to any collective conclusion in relation to the adequacy of the ordinary courts. If the Government, however, makes a determination that the ordinary courts are adequate then the Court must make a proclamation under s. 35(4) bringing the operation of Part V to an end. This function must be performed in good faith and accordingly this implies that the Government, if it is to be in a position to perform the function, must review circumstances in the country in order to be in a position to properly

exercise its function under s. 35(4). This obligation is best illustrated negatively. The Government could not, for example, refuse to consider whether conditions were such that the ordinary courts were adequate to secure the administration of justice. This duty is however, performed by the Government in the normal course of events; there is no requirement of a formal review procedure, or any periodic review.

44. In this case, the trial judge found that there had been ample performance of this duty. In particular, the Offences Against the State (Amendment) Act, 1998 permits for annual review to be made, and a determination to be made as to the continued existence of certain offences provided for under that Act, and which are only triable in the Special Criminal Court. It follows that in considering and proposing the annual renewal of that legislation the Government is necessarily considering the circumstances and whether the point has been reached that it can be said that the ordinary courts are adequate to secure the proper administration of justice and the preservation of peace and order. Furthermore, the trial judge referred to the review of the Offences Against the State Act set up under the chairmanship of a retired judge of the Court of Appeal.

45. The trial judge was, in my view, completely correct to come to this conclusion. The obligation to keep the situation under review exists because of the obligation to act *bona fide* in relation to the functions under s. 35(4) and having regard to the structure of the Act, and the constitutional designation of courts established under Art. 34 as ordinary courts, and, therefore, the norm. No formality is, however, required. If the Government is open to the possibility of making it a determination under s. 35(4) the duty would be fulfilled. In this case, much more was done. While I have concluded the Dáil is under no similar duty as a matter of law, it is clear that the

circumstances are kept under review by that body not least by the annual consideration of the renewal of the provisions of the 1998 Act.

***The role of the Commission as* amicus curiae**

46. Finally, it is necessary to consider the question of the joinder of the Commission as *amicus curiae*. As noted at para. 23, given the urgency of the matter and the short time available, the Court permitted the Commission to address argument to the Court, but deferred a decision on the question of joinder as *amicus curiae* to the resolution of the appeal proper. It is necessary, therefore, to address the criteria for joinder in the circumstances of this case and the arguments made. In one sense, it is always of some benefit to have further information, analysis, and argument. However, neither the practice of the courts, nor the statutory provision empowering the Commission to seek joinder as an *amicus curiae* permit joinder on the basis that *some* information or argument will be offered. This is for good reason. Proceedings can be both costly and lengthy. They are normally between the parties who carry the risk of the costs involved. Any addition to the proceedings must be justified. Claims in respect of the Constitution, or the Convention, or human rights more generally, are in Irish law brought in the same courts which determine all issues of law and fact, civil and criminal. It is a feature of the Irish system that claims that a particular provision of a statue is repugnant to the Constitution can only arise and be determined by a court in proceedings in which it is necessary, indeed, it may be said, unavoidable, to do so in order to resolve the particular dispute between the parties. That dispute must be something which arises on the facts of the case, and where the plaintiff has appropriate standing to pursue the claim. This aspect of that constitutional litigation must be rooted in the facts of a particular dispute, and, as Henchy J. observed in *Cahill v. Sutton* [1980] I.R. 269, this gives particular life and

focus to the claim. Furthermore, it is the parties who determine the issues in the dispute which are to be resolved.

47. An *amicus curiae* can be of assistance to a court in ensuring that the Court has the full range of material argument which allows it to resolve the dispute before it, i.e., the dispute between the parties. That is in the interests of justice in the individual case, since it can assist in the better and more just resolution of it, but it is also in the public interest. Decisions in individual cases on constitutional, Convention or human rights matters, do not merely resolve the issues between the parties, but can create precedents affecting many situations which might never become the subject of adjudication before a court. It is important, therefore, that a case not only be correctly decided, but that conclusion is reached in the correct way, by reasoning that it is sufficient not just to decide the case, but which will provide the best statement of the law for future similar cases.

48. It is central, therefore, to the function of any *amicus curiae* that it assists the Court in resolving the case before it. The clue, in that respect, is in the name. The function is to assist and be a friend to the Court in the task of the Court to determine the issue before it. It is not a function of the procedure to allow or encourage the Court to express opinions on matters not relevant to the determination of the dispute, even if of some legal interest and importance. It is the parties who control the proceedings and define the dispute between them which requires determination. It is this dispute which brings the matter before the Court in the first place, and it is to this dispute – not another dispute that has not been presented by the parties themselves – that the *amicus* must direct its submissions. Submissions around a case that has been neither pleaded, argued nor addressed by the parties themselves are liable to waste cost and time (costs and time, it must be stressed, of the actual parties to the dispute).

49. It is for these reasons that the public interest also favours an *amicus curiae* limiting their assistance and being limited to the case before the Court. If other issues are raised and determined in the absence of a dispute, then it is possible that the issue will not be addressed as fully and resolved as correctly as possible. Furthermore, persons outside the particular litigation but who may have an interest in the resolution of that issue, or being affected by any such determination, may have a legitimate grievance that an issue was determined in their absence and in circumstances which were not required for the determination of the dispute before the Court. Conversely, if an issue was raised by an *amicus*, and not determined, then the process, far from providing clarity and certainty in relation to the law, will have only propagated uncertainty and encouraged further litigation.

50. For all these reasons it has been the practice of any party seeking to join proceedings as an *amicus curiae* to give an assurance or undertaking that they will not, if permitted to join the proceedings, seek to advance any arguments or issues not live between the parties in the proceedings. In some cases, such an undertaking is required by the Court. In *Schrems v. Data Protection Commissioner (No.2)* [2014] IEHC 351, [2014] 2 ILRM 506, Hogan J. observed at paragraph 38 that an *amicus* is "normally bound by the parameters of the existing litigation". At paragraph 14 of the same judgment Hogan J. stated:-

> "In essence, the court will appoint an *amicus* only where it is satisfied that that putative party will be in a position to assist the court <u>in respect of the legal issues which arise within the scope of the proceedings as defined by the parties</u>, often by availing of the peculiar expertise or insight at its disposal". (emphasis added).

In *M v. Minister for Justice and Equality* [2018] IESC 7, this court (O'Donnell, McKechnie and Dunne JJ.) refused an application by an interest group to participate in an appeal observing that "[t]he desire to advance arguments of more general application consistent with a group's generally expressed views, would exert a gravitational pull away from the particular issues in this case and towards more general matters of public controversy and accordingly away from the court's central function".

51. While the broad distinction is clear, it may be difficult to draw it in a particular case. There may be legitimate questions as to the point at which submissions stray over a line separating submissions providing assistance in the resolution of the issue before the Court by way of providing a comprehensive backdrop against which the issue may be determined, and submissions on issues of importance but not raised in the proceedings although related to them. In such cases, courts often adopt a reasonably tolerant approach on the basis that what proves to be irrelevant can be excluded from consideration at a later stage.

52. This case, however, is well beyond any possible boundary line. The case made by the Commission was explained by reference to its challenge as to whether the High Court was correct to hold that the decision of the Government to make and maintain a proclamation was non-justiciable as long as the opinion of the Government was *bona fide* held. Although such a statement was made in the High Court judgment (and as set out above would appear to be incorrect), it was not any part of the *ratio decidendi* of the High Court. The Government's proclamation was not challenged in these proceedings. However, the submissions on behalf of the *amicus curiae* went on to argue for "the need for an objectively demonstrated justification for a proclamation" and that it should "possible to test the reasonableness and

proportionality of a decision to maintain a proclamation in force". Again, the submissions raised the question of whether the *dicta* of Keane J. in *Kavanagh* are consistent with the subsequent decision of this Court in *Burke*. It might be noted that paragraph 46 of the judgment in *Burke itself* raised a question about the language adopted in *Kavanagh*. However, *Kavanagh* was a case concerning a challenge to the proclamation. No such challenge is made in these proceedings. On the contrary, the appellants' case depends upon an acceptance of *Kavanagh* and in certain respects relies on *dicta* contained in it.

53. The fact that the focus of the Commission's submissions is entirely different from the claim made in these proceedings is apparent, for example, from the suggestions made as to the test that the courts must apply including an assessment of the proportionality of the measure in order to achieve a constitutionally acceptable balance of competing rights when considering "the constitutionality of a measure". The submissions go on to argue that there were alternatives to the establishment of the Special Criminal Court in the shape of measures directed to the protection of juries, and that it was "the courts' duty to properly review the proclamation power including on grounds of proportionality". In an appropriate case, it was submitted, a court should "require the Government to demonstrate that there are no means of protecting the common good and rights of the community, while at the same time vindicating the rights of an accused person to trial by jury". In addition to these claims, the submissions also included extracts from Dáil debates quoting from academic works. This appears to raise the question both as to the capacity to introduce such material in the course of this appeal, and the extent to which the Court could have regard to such matters even if properly adduced.

54. It seems plain in this case, that the submissions sought to be made raise issues quite separate and distinct from those involved in the appellants' case and do not resolve or purport to resolve the issues raised. In those circumstances, and notwithstanding the fact that it has been necessary to refer to some of these matters in the course of this judgment, it is apparent that the application does not satisfy the general principles on which an *amicus curiae* may be permitted to participate in an appeal. While it is not necessary to make any order in this case, in future cases in which a party seeks joinder as an *amicus curiae,* it is to be expected that the nature of the contentions sought to be raised and whether they can assist in the resolution of the particular case before the Court, should be specifically addressed in any application for joinder.

E. Conclusion

55. The applicants challenge to their trial before the Special Criminal Court accordingly fails. The Special Criminal Court has full jurisdiction to try the applicants on the charges in question. As the applicants have failed in the case advanced by them in this application, their respective trials can now proceed. The appeals must be dismissed.