THE SUPREME COURT
JUDICIAL REVIEW

Record No: 2022/0031

BETWEEN:

JONATHAN DOWDALL

APPELLANT

AND

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

RESPONDENTS

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

AND

Record No: 2022/0032

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

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

SUBMISSIONS ON BEHALF OF THE AMICUS CURIAE

Summary of the arguments of the *Amicus Curiae*

1. The focus of the Amicus Curiae ('the Commission') is on whether the High Court was correct to hold that a decision of the Government to make and to maintain a Proclamation under Part V of the Offences against the State Act 1939 ('the 1939 Act') is non-justiciable, as long as the opinion of the Government is *bona fide* held.

2. The Commission respectfully submits that this finding and the *dicta* of this Honourable Court in *Kavanagh v Government of Ireland*[1], on which the Learned High Court Judge

[1] [1996] 1 IR 321

based his finding, must now be re-assessed in light of the Judgments of O'Donnell C.J. and Charleton J in *Burke v Minister for Education and Skills*[2].

3. The Commission submits that the lawfulness of a Proclamation made under Part V of the 1939 Act is justiciable, and can be reviewed without constraints such as the application of a 'clear disregard' test. Given the Courts' duty to protect the constitutional right to a jury trial, and given the systemic impact of a Proclamation on that right, the Courts must be able to review the making and the maintenance of a Proclamation.

4. Rather than exercising an inherent executive power consigned by the Constitution, the Government is acting under Part V of the 1939 Act as a statutory decision-maker. It was the Oireachtas which was entrusted, under Article 38.3.1 and 38.3.2, with the responsibility to regulate the use of Special Courts.

5. The Government was chosen by the Oireachtas as the body which must be 'satisfied' to make and to maintain a Proclamation. The Government is therefore performing a function which has been delegated to it by the Oireachtas, but which could be delegated to another decision-making body established by law, or retained by the Oireachtas itself.

6. Importantly, in deciding whether to make a Proclamation, the Government applies pre-established criteria. The relevant policy, and the test to be applied in pursuit of this policy, are clearly set out in Article 38.3.1:

> *Special courts may be established by law for the trial of offences in cases where it may be 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.*

7. The Constitution does not permit a broad-based discretion or the application of high policy in respect of the establishment of Special Courts. The Government must exercise its judgment in respect of issues of fact, applying an existing policy with well-defined parameters. In particular, it 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.

8. Applying the criteria identified by O'Donnell C.J. in *Burke*, the Commission submits that all of these factors support the conclusion that the power exercised by the Government under Part V of the 1939 Act, while it is undoubtedly extremely important and impactful, is administrative in nature. It must be subject to unconstrained judicial review.

9. The Commission argues that the need for an objectively-demonstrated justification for a Proclamation is heightened by the practical unreviewability of individual prosecutorial decisions taken following the making of a Proclamation.

10. It is also argued that the provision in Part V for democratic control of the Proclamation power by the Dáil does not oust the jurisdiction of the Court to review the use of the power. Moreover, that control could not amount to a sufficient safeguard of constitutional rights.

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[2] [2022] IESC 1

11. The Judicial Power cannot properly vindicate the constitutional right to a jury trial, if it is not possible to test the reasonableness and the proportionality of a decision to maintain a Proclamation in force. The Commission acknowledges that a process of seeking reasons for, and an assessment of the proportionality of, a Proclamation decision would not be straightforward, having regard to the subject-matter of the decision and the manner in which the decision is taken. However, these are not reasons in principle to restrain judicial review, but rather potential difficulties to be confronted in the review process.

A distinction must be drawn between policy and administration, and between inherent executive power and delegated statutory power

12. As a Proclamation decision will impact on the right to a jury trial in a systemic way, it must be seen as a power affecting a constitutional right. In this regard, the decision in *Burke v Minister for Education and Skills* is significant for its restatement of the principle that the Courts' duty to uphold the Constitution and in particular to protect constitutional rights may require judicial review of decisions taken by the Government, including pursuant to the inherent executive power.

13. O'Donnell C.J. described the general principle as follows:

> *'48. ... the courts and the State more generally have proceeded on the basis that the Constitution requires that the Court shall have jurisdiction to determine if the executive branch has failed to comply with the provisions of the Constitution. This conclusion follows once again from a consideration of the text and structure of the Constitution. The courts are obliged to uphold the Constitution and the actions of the Government are not immunised from judicial scrutiny in, for example, the same way as the acts of the president (Article 13.8), the utterances in either House of the Oireachtas (Article 15.13), or when the action is said to fall under Article 45. It seems to follow that citizens may have recourse to the courts to argue that the Government has not acted in compliance with the provisions of the Constitution, without having to establish that any personal right of the citizen has been affected, or indeed, that they have any better claim to raise such a contention than any other citizen.'*

14. The *Burke* decision demonstrates that if, in the exercise of its inherent executive power, the Government acts unconstitutionally, the Courts are not always constrained in the application of judicial review principles. Moreover, *a fortiori,* where Government action is not pursuant to inherent executive power, there is even less reason to exercise judicial restraint in reviewing such action. O'Donnell C.J. said at para 33:

> *'... While it is perhaps easy to argue that the decisions of high policy decided at Cabinet level should be approached with some significant margin of appreciation given the differing functions the Constitution envisages that the Government on the one hand and Courts on the other will perform (and the fact that the Government is by Article 28.4 responsible and accountable to the Dáil) it is more difficult to see how or why the principles should apply to more granular decisions taken of an administrative variety, particularly where the decision is made by Government pursuant to a power or duty conferred or imposed by statute, and which could conceivably have been conferred on another body and where the decision would not attract the same deference.'*

15. *Kavanagh* was included in *Burke* in a summary of the landmark cases wherein judicial review had been constrained by virtue of the nature of the power being exercised. After reciting cases such as *Boland*[3], *Crotty*[4] *and McKenna*[5], O'Donnell C.J. said at para 59:

> *'Kavanagh, while involving a statutory power, is somewhat unusual in that the statute in question gives effect to the constitutional provision permitting the establishment of special courts for the trial of offences where it may be determined that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. That determination involves calls for a broadly political judgement rather than a forensic determination by a court. Effect was given to that constitutional provision by the terms of the 1939 Act, and it followed that where it was contended that the declaration made by the Government was in some way in breach of the Constitution, that it should be necessary to demonstrate some clear disregard for the provisions of the Constitution.*
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> *60. It is also arguably consistent with this approach, that where the Constitution calls for a broad-based judgment, and does not constrain it by any specific restrictions or standards, that the primary accountability for such action lies under Article 28 with the Dáil, and that this reinforces the analysis of the judicial role as arising only in the cases of clear disregard. These cases illustrate circumstances where the courts have been called on to review the actions of the Government in different spheres, where it is contended the Government has failed to act in accordance with the express or implied mandates of the Constitution, and have held that the court may only interfere in an exercise of power consigned by the Constitution to the Government where there has been clear disregard of such express or implied mandate.*
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> *61. However, a different analysis applies where it is alleged that an executive action infringes the constitutional rights of the citizens. For the reasons touched on above, the circumstances in which the executive may be brought into direct conflict with the fundamental rights of the citizen may be more limited than is the case of legislative action, but where such is alleged, there is no reason why the Court should apply a different standard if it is established that the constitutional right is affected. There is nothing in the Constitution to suggest that the judgment is political in nature or that the Dáil has a particular expertise in the area so that accountability of the Government to the Dáil should be seen as the primary or sole method of protection of the rights of the citizen. The courts' obligation is to defend and vindicate the rights of the citizen. There is no reason under the Constitution to extend deference to the executive's decision in this regard, over and above the presumption of constitutionality arising from the respect due to both of the other branches of government. But if it is established that the actions of the Government have breached the rights of the citizen, then the courts must uphold the Constitution, and defend the rights of the citizen, in the same way and applying the same standards, as if those rights had been infringed by the actions of the legislative branch of government. This is indeed what Griffin J. said in Crotty, and approved in Kavanagh:- "Where [Government] actions infringe or threaten to infringe the rights of individuals citizens or persons the courts not only have the right to*

[3] *Boland v. An Taoiseach* [1974] I.R. 338
[4] *Crotty v. An Taoiseach* [1987] I.R. 713
[5] *McKenna v. An Taoiseach (No 2)* [1995] 2 I.R. 10

interfere with the executive power they have the constitutional obligation and duty to do so…" [Emphasis added].

16. O'Donnell C.J. cast some doubt on whether the relevant principles had been properly elucidated in the reasoning of the Court in *Kavanagh*:

> *'46. An important distinction must be drawn between the provisions of the Constitution protecting the fundamental rights of the citizen on one hand, and those on the other, which regulate the separation of powers and in particular the conduct of the executive branch. This distinction was not squarely addressed in Boland or the subsequent case law. The statement of principle made by Griffin J. in Crotty and adopted with approval by Keane J. in Kavanagh runs the two issues together. Since no distinction was made, no consideration was given to whether different tests applied to review of Governmental action.'*

17. In *Burke*, the Proclamation power was not at issue and it was not the subject of argument. Applying the criteria set out by O'Donnell C.J., it is submitted that the Proclamation power does not fall within the inherent executive power at all. The power is not derived from the Constitution, which expressly entrusted the establishment of Special Court to the Oireachtas. Therefore, the power was not *'consigned by the Constitution to the Government'*.

18. Moreover, the Proclamation power does not constitute an area of high policy. It does not require '*a broad-based judgment',* and the Constitution does, in fact, *'constrain it by… specific restrictions or standards.'*

19. As Charleton J noted in *Burke*, not all decisions of the Government are an exercise of executive power:

> *'10. There is no doubt, however, that a government can administer through Cabinet decisions and that not all decisions of Government are an exercise of the executive power of the State through Article 28.2. Hogan, Morgan and Daly, Administrative Law in Ireland (5th edition, Dublin, 2019) 2, in describing administrative action, usefully sets out criteria whereby resolutions of policy may be contrasted with the kind of administrative decisions which are amenable in the ordinary way to judicial review. These distinctions focus on the nature of a governmental decision, of its essence a matter of policy and hence the pursuit of an ideal, in contrast to the precision which should be presented to an administrator who is left to apply the scheme to individual circumstances, thus: administration assumes that there is already in existence a principle and that all the administrator has to do is to establish the facts and circumstances and then to apply the principle. It is of the essence of good administration that the principle must be fairly clear and precise so that, in any given situation, the result should be the same, whether it is administrator A or administrator B who has taken the decision. For, in its purest form, administration requires only a knowledge of the pre-existing principle and an appreciation of the facts to which it is being applied; it is an intellectual process involving little discretion. By contrast, policy-making is largely discretionary; the policy-maker must decide, as between two alternatives, the one which he or she considers best in the interest of the community … [taking into] account all of the relevant factors and which factors are relevant is, to a considerable extent, left to him or her.'*

20. Charleton J offered the following definition at para 36:

> *'... administration is the following through on schemes which policy has previously decided ought to be in place and where the parameters have been set whereby all that needs to be done is to decide on eligibility. Executive power, in contrast, truly engages the exercise of policy decisions whereby administrative schemes may be put in place or whereby the fundamental machinery of Government is moved to offer the nation's support in international relations or in introducing changes to domestic life which have far-reaching consequences for the life of the State.'*

21. Applying these criteria to the Proclamation power, it is submitted that it is an administrative function, rather than an executive power involving discretionary policy considerations.

22. The Government is performing an administrative function which could have been delegated to another decision-making body established by law, or retained by the Oireachtas itself. In such circumstances, as O'Donnell C.J. noted, '*the decision would not attract the same deference.'*

23. It is accepted that the Proclamation power under Part V might be described as 'political' in the sense that the Government ordinarily makes political decisions. The Proclamation power is also political in the sense that it is controversial and far-reaching and as a result, it ought to be subject to debate and ultimate control by the Dáil.

24. However, there is a critical sense in which the Proclamation is not the exercise of political power. Certain powers have been reserved under the Constitution to the Government. Plainly, the Proclamation is not such a power. The executive powers considered in cases such as *Boland, Crotty* and *McKenna* are of a different nature. They related to the executive's inherent power to conduct external relations, and to control the allocation of collected funds in pursuit of policy aims.

25. Keane J held in *Kavanagh* that *'where the Constitution has unequivocally assigned to either the Government or the Oireachtas a power to be exercised exclusively by them, judicial restraint of an unusual order is called for before the courts intervene.'* However, it must be reiterated, the Constitution did not assign the power to the Government. It assigned the power to regulate Special Courts to the Oireachtas.

26. The power to legislate which was assigned under Article 38.3.1 is no different to any other power to legislate, which would be subject to judicial review. By delegating the decision-making power to the Government, the Oireachtas did not, and under the separation of powers it could not, create an area of unreviewable executive power through legislation. Rather, it created an administrative function which is reviewable by the Courts.

The interaction of the Government and the Dáil in the maintenance of a Proclamation

27. It was suggested by Barrington J in *Kavanagh,* that as the structure of Part V of the 1939 Act provided for ultimate control by the Dáil (thereby mirroring the relationship between the executive and legislature as set out in Article 28.4.1 of the Constitution), this reinforced

the conclusion that the Proclamation decision was primarily political in nature and thus, not suitable for judicial review.

28. Where powers are delegated to the executive under legislation, their subordinate enactments are very frequently subject to a power of review and annulment by the Oireachtas. Although the delegated power in this case, in the form in which it is exercised by the Government, might properly be seen as administrative rather than legislative in nature, the analogy is still relevant. Pursuant to Article 38.3.1, such a power could not be exercised at all without a legislative basis.

29. The power of review and annulment of subordinate legislation by the Oireachtas is increasingly seen as part of the system of checks and balances under the proper separation of powers, having regard to Judgments such as *Bederev*[6] and *NECI v The Labour Court*[7], where Charleton J said at para 24:

> *'... reconsideration and either the absence of objection or a positive affirmation is both democratic and an indication of approval. For such taking back to itself, the Oireachtas, through its individual members, can be held electorally responsible should the measure generate individual approval or informed public debate.'*

30. It is important to note that, even where a power of review of subordinate legislation is provided for in parent legislation, the Courts still retain their own role in respect of the review of the delegated power. Therefore, the fact that the structure of Part V requires that the Dáil retains ultimate democratic control is not at all unusual, particularly in respect of such an impactful and important delegated power.

31. It is not a basis, therefore, to assert that a Proclamation is a purely political power. The power of the Dáil in Part V of the 1939 Act to annul a Proclamation is intended as a democratic measure and is also a recognition that the power to establish Special Courts was entrusted to the Oireachtas under the Constitution.

32. In respect of the democratic oversight provided by the Dáil, Barr J in the High Court said at para 89:

> *'The fact that the Offences Against the State Act 1939 was amended by legislation in 1998, shows that the executive and Dáil Éireann were of opinion that it was necessary to bring in legislation which implicitly recognised the ongoing need for the Special Criminal Court. The resolutions that have been passed pursuant to s.18 of that Act and pursuant to s.8 of the Criminal Justice (Amendment) Act 2009, whereby certain offences are certified as being proper to be proceeded with before the Special Criminal Court, implicitly recognises the need for the continuance of the Special Criminal Court.'*

33. While the Government is answerable to the Dáil under Article 28.4.1, under our constitutional scheme the Government both sits in and controls the Dáil. The prospect of the Dáil annulling a Proclamation that the Government wishes to keep in force is a remote one.

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[6] *Bederev v Ireland* [2016] 3 I.R. 1
[7] [2021] 2 ILRM 1

34. In practice, the historic role of the Dáil under Part V of the 1939 Act has been that of a forum where concerns about, or support for, the use of Special Courts can be ventilated and where the Government can set out, for democratic purposes, the justification for its retention.

35. The Commission has been unable to find any specific debates in the Dáil about the legislative reforms proposed by the Committee to Review the Offences Against the State Acts 1939-1998 (the Hederman Committee'), for example, the recommendation that a Proclamation be subject to periodic review by both Houses of the Oireachtas. The Hederman Committee report has, however, been referenced by Opposition TDs during the annual resolutions in respect of the operation of other aspects of the Offences Against the State Acts 1939-1998 and of the Criminal Justice Act 2006.

36. In the context of assessing whether the maintenance of a Proclamation can be sufficiently addressed in the political process alone, it is worth noting that debate in respect of these annual resolutions appears to have been affected by the paucity of information contained in the 'statutory report' provided to Dáil deputies. Ivana Bacik, in a 2021 essay entitled *The Offences against the State Act – reflections from practice and legislature*[8]*,* addressed this issue as follows:

> *'While the reports typically provide information on the number of times each offence has been 'used' and the arrests made under each provision, they do not provide any real detail as to the basis for the annual government assertion that the ordinary courts are inadequate to administer justice. This represents a significant difficulty for legislators – and a notable flaw within the parliamentary scrutiny process, a point strongly asserted during the debates on the 2019 renewal motions, the twentieth occasion on which the Oireachtas considered renewal of the 1998 Act provision."*[9]

37. Bacik recounts that during the 2019 renewal debate, Deputy Sean Sherlock submitted that the information which was available to the Government should also be made available to legislators; and that the statutory report should expressly address the core question of whether jury courts are inadequate to secure the effective administration of justice. Minister Flanagan responded by asserting that:

> *'It is not the role of the Minister for Justice and Equality to form the minds of Members of the Oireachtas. The reason we are debating here is because I see myself as having a duty to inform the Members of the facts but it is reasonable to assume that Members will engage in their own research, consideration and knowledge, the sum total of which will form the views of Members, including the views of Members as to the operation of normal courts and the capacity to administer justice in circumstances.'*

38. In respect of this assertion, Bacik noted that:

> *'… much of the information on which the assertion is based will be primarily within the domain of the government. Over 20 years of debates, the general justification of 'security concerns' has typically been presented before the Oireachtas by successive*

[8] In 'Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?'* (Hart 2021)
[9] At p.216

Ministers as the basis for seeking renewal, without any specific reference to particular identified concerns. All too often, Ministers have referred to their own belief that renewal is necessary, in language similar to that used where a Garda Superintendent makes a statutory assertion of belief in membership prosecutions… Yet, if a renewal decision made by the Oireachtas was grounded on inadequate evidence, or indeed taken without reference to any objective evidence, it might be argued that the renewal has not constituted a determination ' in accordance with law ' under Article 38 of the Constitution.'

39. The Commission, in referring to these exchanges in the Dáil and to the practical reality of the relationship between the Government and the Dáil, is not asking the Court to review or to criticise the democratic process. Rather, the Commission seeks to emphasise that the role of the Dáil under Part V is not a sufficient safeguard to obviate the need for the Courts to exercise their own particular function.

40. The democratic legitimacy and the political acceptability of a measure is not the same thing as the constitutionality of a measure. The Courts must apply a different test, including an assessment of the proportionality of the measure, in order to achieve a constitutionally acceptable balance of competing rights.

Determining whether the ordinary courts are inadequate does not require the application of policy or discretion

41. Since the foundation of the State, there have been significant challenges to the administration of justice by reason of jury interference, and for a time, the reluctance of jurors to convict in certain types of cases.

42. Even before the foundation of the State, jury trials were considered unsatisfactory by the various parties to the criminal trial process, albeit for differing reasons. Notwithstanding the *'vital constitutional obligation on the State'* to protect the right to jury trial referred to in *Murphy v Ireland*[10], Coen has argued[11] that arising from these accumulated historical controversies, a certain ambivalence about the value of jury trials was carried forward.

43. In the Civil War period and in its aftermath, there were extremely serious attempts to interfere with the administration of justice, culminating in an incident in 1929 where a witness was murdered and a juror injured.[12] It is notable that even during a period of apparent existential threat to the State, the organs of the State nonetheless sought to secure the ordinary administration of justice. The Oireachtas enacted the Juries (Protection) Act 1929, temporary legislation which was renewed and remained in force until 1933. To make jury intimidation more difficult, it provided for the introduction of majority verdicts, anonymity for jurors, the clearing of courtrooms and a statutory offence of juror interference.

44. Despite the availability of these mitigating measures, and following the murder of a number of Gardaí, severe security measures were introduced. The amendment of the 1922 Constitution through legislation, in Article 2A, provided for trial by military tribunal in

[10] *Thomas Murphy v Ireland* [2014] 1 IR 418 at para 15 *per* O'Donnell J (as he then was)
[11] Mark Coen, 'A certain ambivalence: Independent Ireland and trial by jury' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) p. 55
[12] Coen, ibid, p.50

respect of a wide range of offences. In comparison to that extraordinary measure, the criminal process powers in the 1937 Constitution and in the 1939 Act were less draconian and more bounded by legal norms. Moreover, despite some indications to the contrary[13] by the Constitution Committee prior to the enactment of the 1937 Constitution, a general and undiluted constitutional right to trial by jury was ultimately provided for.

45. The provision for Special Courts in Article 38.3.1 must be seen against this historical background. In seeking to ensure that the administration of justice was protected from interference, it was intended that recourse to Special Courts would arise where there was a risk that a jury would not comply with its oath, whether by reason of political sympathy or intimidation. There was no other basis for a determination that the ordinary courts were inadequate to secure the administration of justice.

46. This remains the case. No other policy considerations could arise in respect of providing for trial before a Special Court. In light of the general constitutional right to trial by jury in Article 38.5, and having regard to the wording of Article 38.3.1 and its historical context, a decision to provide for Special Courts requires a specific assessment of whether the existing jury system is inadequate because of the risk of impropriety in respect of juries.

47. Recent statistics show that the conviction rate in the Special Criminal Court is *'notably and consistently high.'*[14] It may be easier to convince two out of three jurors of an accused's guilt, than it is to convince ten out of twelve. However, despite the potential benefit to the Prosecution which comes with trial in the Special Criminal Court, any policy that a particular class of offenders should be denied a jury trial because securing a conviction would be more straightforward before a three-person Court, would not be constitutionally acceptable.

48. There have been concerns expressed by eminent and informed observers as to whether policy concerns unrelated to jury impropriety have contributed to the maintenance of the 1972 Proclamation. A minority of the Hederman Committee (Hederman J, Prof. William Binchy and Prof. Dermot Walsh) expressed themselves in trenchant terms[15]:

> *'The existence of the Special Criminal Court can best be explained not by factually justified and specifically focused concerns relating to the risk of jury intimidation unique in the common law world, but by the desire to use strong means to put down violent, politically inspired crime.'*

49. These comments are mentioned, firstly to highlight that a Proclamation decision requires a focused assessment and not a broad policy choice, and secondly, that there is scope for legitimate concern that a decision-maker might have regard to irrelevant or even unconstitutional considerations. Such policy considerations would not be apparent or discernable, unless proper judicial review was possible.

The obligation to justify a decision that the ordinary courts are inadequate

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[13] G Hogan , *The Origins of the Irish Constitution: 1928 – 1941* (Dublin Royal Irish Academy, 2012) 74 –100
[14] See Liz Campbell, 'The Offences Against the State Acts and Non-Subversive Offences' in Coen, ibid. 136
[15] Para 9.92

50. There is no publicly-available evidence supporting the contention that jury intimidation has occurred systemically in recent times. That is not to say that the risk is theoretical. An example can be found in the 2006 Court of Criminal Appeal case of *DPP v James Walsh*[16], where the accused was convicted of the offence of embracery. In a recent survey[17] involving Judges and criminal law practitioners, it was noted that *'While there was no sense of widespread jury interference, it was nevertheless regarded by interviewees as a known feature of a small number of Irish jury trials'.*

51. The *Kavanagh* case itself related to a 'tiger-kidnap' of a bank official by a gang whose leader had previously been suspected of a car-bomb attack on a forensic scientist witness, and of a break-in at the offices of the DPP. Similarly, the prosecutions arising from the death of Veronica Guerin involved a gang responsible for a murder which was unprecedented in its ruthlessness. Such gangs might reasonably be considered capable of attempting to bribe or to intimidate jurors.

52. Nevertheless, a key consideration when determining whether to bring a Special Court into existence is not just whether there is a risk of jury interference, but whether that risk is insurmountable or could be sufficiently mitigated, so as to preserve the constitutional right to trial by jury.

53. Whether juries can be sufficiently protected from interference is a matter to be evaluated by the statutory-decision maker. The difficulty with adopting a deferential standard of review in respect of a Proclamation under Part V of the 1939 Act is that there is no way of knowing if the decision-maker has properly evaluated the risk and has properly considered whether mitigation measures might be effective.

54. It is acknowledged that mitigating the risk sufficiently would potentially involve introducing legislation. There have been ample studies, reports and legislative precedents on which to ground such legislation, if the Government and the Oireachtas chose to pursue them. To date, they have not. This is not to suggest that such options have simply been ignored. The Government is presumed to act constitutionally and to have exercised its judgment in respect of the efficacy and appropriateness of such measures.

55. Nevertheless, the potential availability of alternatives to a Special Court is relevant to the Courts' duty to properly review the Proclamation power, including on grounds of proportionality. It is respectfully submitted that it is not a breach of the separation of powers, in an appropriate case, to require the Government to demonstrate that there are no means of protecting the common good and the rights of the community, while at the same time vindicating the rights of accused persons to trial by jury.

56. It is therefore submitted that if the Courts treat the establishment of Special Courts as an unreviewable political issue, this will stifle the prospect of legislative initiatives which would vindicate the right to jury trial more fully.

57. It is arguable that if sufficient mitigating measures were in place, there would be no need for non-jury courts. The argument in support of this position has been well-summarised by

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[16] [2009] 2 I.R.1

[17] Mark Coen, Niamh Howlin, Colette Barry and John Lynch, *Judges and Juries in Ireland: An Empirical Study* (UCD 2020) at p.116

the minority (Hederman J, Prof. William Binchy and Prof. Dermot Walsh) in the Hederman Committee report:

> *'9.92 If a pressing case for the necessity of a special criminal court could be made out, we naturally would heed it, but in our view no such case has been proferred. All that has been indicated is a belief, based on an assessment of the undoubtedly violent and intimidatory disposition of certain criminals, that these criminals might successfully intimidate juries if they or their associates were tried by jury.*
>
> *9.93 In measuring the weight of this concern, it is worth noting that no other common law jurisdiction has come to the conclusion that the risk of jury intimidation warrants non-jury trial in a special criminal court. In Northern Ireland, but not in England, Wales or Scotland, there is, at present, a system of criminal trial involving judges without a jury: the "Diplock Courts"; it is our understanding that the British Government is committed to move as quickly as circumstances allow to jury trial for all offences. While Ireland unfortunately has experienced the growth of organised crime in recent years, it is not plausible to suggest that, in contrast to other common law jurisdictions such as the United States of America, England and Australia, Irish social conditions are so perilous as to warrant dispensing with jury trial. Few would suggest that had the 1939 Act not come into being in the context of concerns for subversion, legislation would have been enacted in recent years to dispense with jury trial for those suspected of organised crime.*
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> *9.94 With any system of jury trial, there will be the possibility of jury intimidation. That risk will be greater in some cases than others, but there is no evidence, from any jurisdiction, that the risk is of such proportions as to warrant dispensing with trial by jury. Other common law jurisdictions have not taken such a suggestion seriously.*
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> *9.95 There are many steps that can be taken to reduce the possibility of jury intimidation. Juries can be anonymous; they can be protected during the trial; they can even be located in a different place from where the trial is held, with communication by video link. It is true that in a small jurisdiction such as Ireland, anonymity is hard to secure, but if the jury are anonymous and at a secure and secret location, the risk of effective jury intimidation would not be very great. At some point, the theoretical risk of the possibility of jury intimidation becomes frankly implausible.*
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> *9.96 The existence of the Special Criminal Court can best be explained not by factually justified and specifically focused concerns relating to the risk of jury intimidation unique in the common law world, but by the desire to use strong means to put down violent, politically inspired crime. That desire is understandable but the means are, unfortunately, inconsistent with the values of a modern liberal democratic society and the protection of human rights. In our judgment, the best course is for Ireland to join all other common law countries with jury trial and dispense with the Special Criminal Court.'*

58. In respect of any particular accused person, the decision to put the accused on trial in the Special Criminal Court will be taken by the Director of Public Prosecutions. However, the Director is necessarily constrained in her choices by reason of the absence of alternatives. No legislative initiatives to mitigate risk to juries have been enacted, comparable to those

provided for in the Juries (Protection) Act 1929 or as recommended by the Law Reform Commission in its comprehensive 2013 report on jury service.[18]

59. It is further submitted that the need for review by the Courts of the decision of the Government to make and maintain a Proclamation is heightened by the unreviewability, in nearly all cases, of individual decisions by the Director of Public Prosecutions to direct trial there.

60. Following the decision of this Honourable Court in *Murphy v Ireland*, it is possible to seek reasons for such a decision. However, the *Murphy* decision has had a *'narrow[19]'* impact on the vindication of the right to a jury trial. Coen suggests[20] that the identified right to reasons in *Murphy* was *'qualified into oblivion'* by an acknowledgement that the DPP may be constrained in providing any reason in a particular case, or could offer that the accused was suspected of being in a class of offender who might seek to interfere with the administration of justice.

61. In a decision of persuasive value which was not expressly addressed in *Murphy*, the UN Committee on Human Rights held in *Kavanagh v Ireland[21]* that the State had failed to provide a reasoned, objective justification for that applicant's trial before the Special Criminal Court. In response to this decision, the Hederman Committee had recommended a right of independent or judicial appeal from decisions of the DPP to direct trial in the Special Criminal Court.

62. The Commission submits that the obligation to provide a reasoned, objective justification for use of Special Courts applies not just to individual prosecutorial decisions, but to the justification for use of the Proclamation power.

How is a Proclamation decision to be reviewed?

63. If an affected person is entitled to seek, in the context of judicial review, justification for a decision to maintain a Proclamation in force, the question arises as to what extent the decision-maker must disclose the basis on which the decision was reached.

64. The Commission submits that, as in any process of judicial review, the exercise of the Proclamation power by the Government can be assessed by the Courts on grounds of reasonableness and proportionality. In this regard however, complexities arise by reason of the fact that the Proclamation decision is taken within Cabinet. A reasoned justification for the making of the Proclamation would not be provided as part of the normal process of Government. However, it should be reiterated here that the Oireachtas might have provided for a different decision-maker in respect of the Proclamation, who would not be afforded deference and who would be expected to justify their decision in so far as possible; either at the time of the making of the decision or in the context of a judicial review.

65. The process leading to a Proclamation decision of the Government might involve intelligence briefings about the risk to jurors, in respect of both the subversive and

[18] Pages 91-104
[19] Campbell, Ibid, p.136
[20] Ibid, p.55
[21] Joseph Kavanagh v. Ireland, Communication No. 819/1998

organised crime contexts. It should be reiterated, however, that such considerations cannot make the process unreviewable in principle.

66. It is worth considering, in this regard, the standard of review applied by this Court in *A.P. v Minister for Justice.*[22] At issue in that case was a decision of the Minister for Justice to refuse naturalisation based on undisclosed national security concerns. This was an area of traditional core executive power, now regulated by statute, and in respect of which there existed an 'absolute discretion'.

67. In *A.P.,* even though no constitutional right was engaged by the refusal of citizenship other than a right to fair procedures, the Court held that reasons should be provided for a decision on citizenship and that any decision not to disclose further reasons also had to be properly justified.

68. The Court held that a failure to give more detailed reasons could only be regarded as justified if that failure impaired the entitlement to reasons to the minimum extent necessary to protect any legitimate countervailing interests. It was therefore incumbent on the Minister to put in place measures to ensure that the entitlement of an affected person to reasons was only impaired to the minimum extent necessary.

69. The Court, *per* Clarke C.J. made the *obiter* comment[23] that it was at least possible to put in place an enhanced process whereby, for example, an independent assessment could be made as to whether any version of the information, or part of it, could be provided in a way that would not affect State interests to the extent that disclosure should not be required.

70. This Judgment led to the setting-up,[24] in September 2020, of a 'single person committee of enquiry' chaired by Hedigan J, to examine intelligence material grounding a refusal of citizenship on national security grounds and to advise the Minister on whether any disclosure is warranted.

71. The relevance of the foregoing, it is submitted, is that it demonstrates that the existence of sensitive national security concerns is not a basis in principle to restrain judicial review or to disapply the requirements of fair procedures, even in respect of decisions taken by the executive pursuant to an absolute discretion, and where no substantive rights are engaged.

Conclusion

72. The decision of successive Governments to maintain the 1972 Proclamation in force has resulted in Special Courts becoming an accepted and normalised feature of life in this State.

73. The constitutional origin of the Special Criminal Court, and its democratic legitimacy as provided for in the structure of Part V of the 1939 Act, is not a sufficient basis to oust the judicial review power of the Courts. While the use of Special Courts has broad political support, this is a separate issue to whether the use of Special Courts is warranted under the conditions provided for in the Constitution itself. This assessment is for the Courts, if it is properly seized of the issue in a controversy before it.

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[22] [2019] 3 I.R. 317

[23] At para 65

[24] https://www.gov.ie/en/press-release/85a40-minister-mcentee-announces-the-establishment-of-the-single-person-committee-of-inquiry/

74. Despite the recommendations by the Law Reform Commission and the Hederman Committee for reform of the system so as to better protect the right to trial by jury (including better protection of jurors from the risk of intimidation, periodic review of the Proclamation, and the availability of an independent appeal from individual prosecutorial decisions), no legislative initiatives have been proposed by the Government.

75. Against this background, a failure by the Courts to acknowledge their role in reviewing the duties of the Government under Part V of the 1939 Act will have a seriously detrimental effect on the protection of the constitutional right to trial by jury.

76. For that reason, it is submitted that the Courts must, when the operation of a Proclamation under Part V of the 1939 Act properly falls for consideration, bring its powers of review to bear in respect of whether the reasonableness and proportionality of the measure have been demonstrated.

Mark Lynam BL

Patrick Gageby SC

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