



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2022:000031

**O'Donnell CJ
Charleton J
O'Malley J
Hogan J
Murray J**

Between/

JONATHAN DOWDALL

APPLICANT

AND

**DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR JUSTICE,
DAIL EIREANN, IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

GERARD HUTCH

APPLICANT

AND

**DIRECTOR OF PUBLIC PROSECUTIONS, MINISTER FOR JUSTICE,
DAIL EIREANN AND SEANAD EIREANN, IRELAND
AND THE ATTORNEY GENERAL**

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered the 29th day of July 2022

Introduction

1. On 26th May 1972 the Government issued a Proclamation under s. 35(2) of the Offences against the State Act 1939 (“the 1939 Act”) bringing Part V of that Act into force: see generally, Davis, *The History and Development of the Special Criminal Court 1922-2005* (Dublin, 2005) at 131-133. The effect of this Proclamation was that the Government expressed itself to have been satisfied that the ordinary courts were “inadequate to secure the effective administration of justice and the preservation of public peace and order.” This paved the way for the establishment of the non-jury Special Criminal Court.
2. Over 50 years later the Special Criminal Court remains in operation. In this appeal the applicants contend that the continued operation of the Special Criminal Court is ultra vires s. 35(2) of the 1939 Act. In essence their case is that the Proclamation was implicitly time-limited and that in enacting s. 35 the Oireachtas could never have been taken to permit the Government to issue what in practice amounts to an open-ended Proclamation of this kind.
3. One can take judicial notice of the fact that the Proclamation was made in May 1972 against the backdrop of the increasing use of para-military violence by illegal organisations and attacks directed against the institutions of State. Over that time the workload of the Special Criminal Court has changed, so that it nowadays deals with many cases which have a background in organised crime. It is, however, important also to state that, the issue *ratione temporis* aside, the validity of this Proclamation has not, as such, been challenged in these proceedings. Nor has the constitutionality of Part V in general or s. 35 in particular been put at issue.

4. Any one who cherishes the right to right to jury trial will, of course, in one sense regret the existence of the Special Criminal Court. But that Court itself has evolved in significant ways over the years. Its predecessor was, of course, the Constitution (Special Powers) Tribunal first established under Article 2A of the Constitution of the Irish Free State (as inserted by Constitution (Amendment No. 17) Act 1931) in October 1931. That Tribunal consisted of three military officers from whom there was no right of appeal. The Tribunal was, moreover, at liberty to impose any sentence it thought appropriate (including the death penalty), even if such was not provided for under the ordinary law. It was no wonder that members of this Court considered that the “extreme rigour” of Article 2A was such that “its provisions pass far beyond anything having the semblance of legal procedure” and that the “judicial mind was staggered at the very complete departure from legal methods in use in these Courts”: see *The State (Ryan) v. Lennon* [1935] IR 170 at 237-238, per Murnaghan J.
5. Much was changed by both Article 38.3.1 of the Constitution and the Offences against the State Act 1939: the Special Criminal Court had to be established by law. Article 38.3.2 further required that the “constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.” The Court as so established was, moreover, a statute-based court with no inherent jurisdiction: see, e.g., *The People (Director of Public Prosecutions) v. Rice* [1979] IR 15 at 20, per Henchy J.
6. Precisely as required by Article 38.3.2, the jurisdiction of the Court was carefully prescribed by ss. 46 and 47 of the 1939 Act. Article 38.3.2 further requires that the procedure of the Court be prescribed by law. Section 41(4) of the 1939 Act accordingly gives effect to this constitutional requirement in that it provides that the practice and procedure and the rules of evidence applicable to a trial in the Central Criminal Court “shall apply to every trial by a Special Criminal Court”. Provision is also now made for

an unrestricted right of appeal by any convicted person to the Court of Appeal: see s.44 of the 1939 Act (as inserted by s. 32 of the Criminal Procedure Act 2010).

7. In other instances, the potential rigour of the 1939 Act has been leavened by either judicial decision or by the application of constitutional principles. Thus, for example, the provisions of s. 34 of the 1939 Act providing for the mandatory disqualification and loss of pension imposed on persons convicted before the Special Criminal Court were found unconstitutional by this Court: see *Cox v. Ireland* [1992] 2 IR 503. While Article 38.6 provides that the specific guarantees contained in Article 34 and Article 35 do not apply to judges of the Special Criminal Court, any such trials must nonetheless be conducted in due course of law for the purposes of Article 38.1. Judicial independence is, of course, an essential hallmark of that guarantee and this Court has already confirmed that all of the judges of that Court enjoy such a guarantee: see *Eccles v. Ireland* [1985] IR 545.
8. While the 1939 Act still contains certain provisions which might, perhaps, with advantage be reviewed by the Oireachtas, the key fact is that the modern day Special Criminal Court is a three judge court staffed by professional judges who are – and must be – independent of the executive. They are required by s. 41(4) of the 1939 Act to apply the ordinary rules of evidence and criminal procedure. They give detailed reasons for their conclusions and there is an unrestricted right of appeal against conviction and sentence to the Court of Appeal.

Section 35 of the 1939 Act

9. This is the general context against which the operation of the Proclamation made under s. 35(2) of the 1939 Act falls to be considered. Here it may be useful to note the wording of s. 35(2), s. 35(4) and s. 35(5) in particular:

10. Section 35(2) provides:

“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...”

11. Section 35(4) provides:

“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.”

12. Section 35(5) provides:

“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.”

13. The wording of these provisions is of importance. Section 35(2) and s. 35(4) are concerned with the powers of the Government regarding the operation of the Proclamation. As the Chief Justice has noted in his judgment, s. 35(2) requires that the

Government form the view that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order before the requisite Proclamation may be made. As I have already noted, there is no suggestion in the present case that the Government could not properly have been “satisfied” for the purposes of s. 35(2) of the 1939 Act when it acted as it did in May 1972 in making the Proclamation.

14. To my mind, however, it is clear from the language of s. 35(4) that the Government is not at large when it comes to rescinding any such Proclamation. The Government may *only* rescind the Proclamation when it is satisfied that the ordinary courts are in fact adequate to secure the effective administration of justice and the preservation of public peace and order. In this respect, s. 35(4) is quite different from the position which obtains with respect to either the powers of Dáil Éireann under s. 35(5) (which I propose to consider presently) or, for that matter, the powers of the Government under the old Article 2A of the Irish Free State Constitution.
15. Section 1(2) of the former Article 2A provided that whenever the Government was “of opinion that circumstances exist which render it expedient”, the Government could declare that Article 2A should come into force, thus allowing for the trial of civilians in respect of criminal offences by military tribunals. Section 1(3) gave the Government a similar power to rescind any such order. This sub-section provided that if the Government was of the view that “the circumstances rendering it expedient” that Article 2A “should be in force no longer exist”, the Government might so order.
16. As a matter of history it can be noted that the incoming Fianna Fáil Government suspended the operation of Article 2A within days of taking office in March 1932: see Constitution (Suspension of Article 2A) Order 1932 (SI No. 11 of 1932). The point here is that that Government found it “expedient” to suspend the operation of Article 2A

because it was politically opposed to the operation of the military tribunals: it was not required by Article 2A for this purpose to make any findings as to the adequacy or otherwise of the ordinary courts. (Of course, again as a matter of history, that Government later found it “expedient” to make an order under s. 1(2) of Article 2A bringing that provision back into force: see Constitution (Operation of Article 2A) Order 1933 (SI No. 91 of 1933)).

17. The key point here is that in contrast to the much looser language of Article 2A, the effect of s. 35(2) and s. 35(4) of the 1939 Act is to tie the hands of the Government both in respect of the making of a Proclamation providing for the establishment of the Special Criminal Court on the one hand and the rescinding of any such Proclamation on the other. The Government is not empowered to make any such Proclamation unless it is satisfied as to the inadequacy of the ordinary courts etc. Conversely, it cannot disestablish the Court unless it is satisfied for the purposes of s. 35(4) that the ordinary courts are adequate etc. for this purpose. Unlike, for example, the position under Article 2A of the Constitution of the Irish Free State, the Government – as distinct from Dáil Eireann – could *not* decide to disestablish the Special Criminal Courts simply for reasons of political expediency or because, for example, it was committed in all circumstances to the principle of jury trial.
18. All of this stands also contrast with the powers given to the Dáil under s. 35(5). This sub-section gives the Dáil the unfettered power at any point to annul any Proclamation made by the Government under s. 35(2). Unlike the situation which obtains with regard to the powers of the Government under s. 35(4), the Dáil is not constrained by the language of s. 35(5) to be first satisfied that the ordinary courts are inadequate for this purpose. Again, unlike the position of the Government, the Dáil could decide to annul the Proclamation simply because, for example, the House wished to return to the

situation where jury trial was the norm or, indeed, for any other reason which happened to command its support.

19. All of this means, therefore, that the Dáil has been given a pure political power by s. 35(5), the exercise of which power is not constrained by any cognisable legal standards or criteria. This power accordingly stands in the same general category of powers such as, for example, the right to vote confidence in the Taoiseach for the purposes of Article 28.10. To my mind, the exercise (or the non-exercise) of such a power, unfettered by legal standards, essentially stands outside the category of reviewable legal powers. These are matters which call for the exercise of pure political judgment and it is precisely because there are no apparent cognisable legal standards or criteria by which the exercise of such political judgment can appropriately be measured that one must conclude that the s. 35(5) power presents a non-justiciable controversy: see generally *Moore v. Minister for Arts, Heritage and the Gaeltacht* [2018] IECA 28, [2018] 3 IR 265 at 281-289.
20. This conclusion, however, is *not* true of the Government's powers under s. 35(2) and s. 35(4) of the 1939 Act precisely because the exercise of these powers must, for the reasons I have already set out, be measured by reference to a clear statutory standard. The exercise (or non-exercise) of that s. 35(4) power is accordingly subject to judicial review.

Conclusions

21. All of this means that once the Government has made a Proclamation under s. 35(2) of the 1939 Act that Proclamation subsists and remains in operation *unless and* until the Government makes a further Proclamation under s. 35(4) to the effect that it is satisfied as to the adequacy of the ordinary court to secure the effective administration of justice and the preservation of public peace and order. The duration of the first Proclamation

is, accordingly, potentially open-ended. Unless, therefore, the Dáil acts by revoking the Proclamation under s. 35(5) – and again bearing in mind that the Dáil is not constrained for this purpose in the same way that the Government is – the Proclamation remains in force unless and until the Government is satisfied as to the adequacy of the ordinary courts under s. 35(4) to secure the effective administration of justice.

22. The applicants here have not challenged the failure of the Government to revoke the Proclamation under s. 35(4). Here I agree with all that the Chief Justice has already said with regard to the nature of the executive power. This is rather a statutory power which the Oireachtas has vested in the Government and it is one which does not involve the exercise of executive power of the State under Article 28.2 of the Constitution. It would, of course, have been open to the applicants to challenge the failure of the Government to exercise its s. 35(4) powers, but there is no such challenge in the present proceedings.
23. In such circumstances I find myself compelled to conclude that the original Proclamation made by the Government in May 1972 remains in force and that as a consequence the Special Criminal Court remains lawfully in operation.
24. It follows, therefore, that I would dismiss the present appeal.